Supreme Court of the United States

OCTOBER TERM, 1965

No. 847

NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

vs.

JOHN P. MORGAN AND CHRISTINE MORGAN

No. 877

NEW YORK CITY BOARD OF ELECTIONS, ETC., APPELLANT

vs.

JOHN P. MORGAN AND CHRISTINE MORGAN

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

JOHN P. MORGAN AND CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS DEB. KATZENBACH, as Attorney General of the United States, DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION—Filed August 6, 1965

Plaintiffs, by their attorney, Alfred Avins, complaining of the defendant, respectfully allege as follows:

1. Jurisdiction of this Court is invoked under the Voting Rights Act of 1965, Sec. 14(b); and under Title 28, U.S.C., Sections 2201, 2282, and 2284.

2. Plaintiffs are both duly registered voters of the City and State of New York, County of Kings, and have been, and are now fully qualified to vote under the laws of the State of New York, as well as under the Constitution and laws of the United States, for government officials of the County of Kings, the City of New York, the State of New York, and the United States.

3. The Constitution of the State of New York, Art. II, § 1, provides in pertinent part as follows: ". . . no person shall become entitled to vote . . . unless such person is also able, except for physical disability, to read and write English." Pursuant thereto, Section 150 of McKinney's New York Election Law enforces this provision.

4. Section 4, subd. (e)(1), (2), Voting Rights Act of 1965, provides:

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> [fol. 2] (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

5. Pursuant to the provisions set forth in Paragraph 4 above, Article II, § 1 of the Constitution of the State of New York, and Section 150 of the Election Law of New York, enacted pursuant thereto, will be rendered unenforceable upon adequate proof of an eighth grade education.

6. Approximately 700,000 persons who have migrated from the Commonwealth of Puerto Rico live in New York City. Of this number, approximately 59 percent read and write only the Spanish language. Many of these Spanish-speaking residents of New York City are of voting age and live in the County of Kings.

7. Plaintiffs allege that under Section 4(e)(1) and (2) of the Voting Rights Act of 1965, large numbers of Spanish-speaking persons who are unfamiliar with the English language would be entitled to vote in the City of New York and the County of Kings notwithstanding that they would not be qualified to vote under New York law. Because most of the information about political issues in New York City is printed in the English lan-
[fol. 3] guage, such Spanish-speaking persons would be unfamiliar therewith. The exercise of the franchise by such persons pursuant to federal law, but in violation of state law, will dilute the effect of plaintiff's vote.

8. Section 4(e)(1) and (2) of the Voting Rights Act of 1965 is unauthorized under the Fourteenth Amendment and hence violates the Tenth Amendment, and deprives plaintiffs of their rights under the Fifth Amendment and the Ninth Amendment to the Constitution of the United States.

9. Under the Voting Rights Act of 1965, the Attorney General is authorized to enforce the aforesaid sections of the statute.

WHEREFORE, plaintiffs pray:

(1) That a Statutory Three-Judge Court District Court be convened pursuant to Sections 2282 and 2284, of Title 28, United States Code;

(2) That this cause be advanced on the docket for a speedy hearing thereof;

(3) That a Declaratory Judgment be issued declaring that Section 4(e)(1) and (2) of the Voting Rights Act of 1965 is in excess of Congress' power to enact and is unconstitutional; and

(4) That an injunction be issued enjoining defendant from taking any steps to enforce the aforesaid statutory provisions; and such other and further relief as to the Court may seem just and proper.

/s/ Alfred Avins
c/o Suite 311
2000 F Street, N.W.
Washington, 6, D.C.
Attorney for Plaintiffs

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-1965

[File Endorsement Omitted]

[Title Omitted]

NOTICE TO ADMIT—Filed August 20, 1965

SIR:

PLEASE TAKE NOTICE, that you are hereby requested to admit the truth of the matters set forth in the annexed affidavits of Alfred Avins and Anthony O'Keefe, made for Supreme Court, New York County, pursuant to Rule 36(a), Federal Rules of Civil Procedure, or to serve a refusal to admit by August 29, 1965.

Dated: August 19, 1965

/s/ Alfred Avins, Dr. Jur.
Attorney for Plaintiffs
c/o Suite 311
2000 F Street, N.W.
Washington 6, D. C.

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 5]

ATTACHMENTS TO NOTICE TO ADMIT

SUPREME COURT: NEW YORK COUNTY

Index No. 12412-1965

In the Matter of the Application of

ANTHONY O'KEEFE, PETITIONER

v.

NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maourice J. O'Rourke, and John R. Crews, RESPONDENT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

ALFRED AVINS, being duly sworn, desposes and says:

1. I am attorney for petitioner and make this affidavit in support of the annexed motion. This affidavit is made to illustrate the reasonableness of the New York law in requiring voters to be able to read and write English.

2. I have investigated the publications of the State of New York which deal with governmental affairs and which an informed voter might want to read to keep himself well informed of what is going on in State government. The large majority are printed only in the English language. The following list of materials printed only in the English language is illustrative, rather than exhaustive: Governor's messages; Journal of the Legislature; Reports of Legislative Committees; Bills introduced into the Legislature; Legislative Manual which contains information about State Government (1364 pages) and is published annually; New York Red Book (965 pages); Regulations published by the New York Secretary of State; State Department administrative reports; Reports of sundry state agencies to the Governor printed for public inspection.

3. The following additional material are published only in English: Constitution of New York State; Constitutional amendments; Laws of New York State, Local Laws (Municipal Ordinances) of New York City; Reports of New York Courts and proceedings therein; Reports of the Judicial Conference.

4. Debates in the State Legislature, New York City [fol. 6] Council, and U.S. Congress are conducted only in English language, and all proceedings in the New York and federal courts are conducted only in the English language.

5. I have ascertained from the City Record office that all of its material is published only in English. This includes the daily City Record, including the minutes of the City Council and Board of Estimate, (a Specimen copy of August 13, 1965 is included herewith as an exhibit); and the City Budget (a Specimen copy for Fiscal Year 1965-66 is included as an exhibit); Real Estate Tax Evaluations; Directory (Green Book); Charter; Local Laws; Department Regulations, and other official city documents.

6. On the federal level, material published only in English includes most official publications dealing with the Federal Government. Included as illustrative are: U.S. Congressional Record; Code of Federal Regulations; U.S. Constitution and U.S. Code; Statutes at Large; Reports of Federal Courts; Congressional Directory; Reports of Administrative Agencies such as National Labor Relations Board, Federal Communications Commission, etc.; Reports of Congressional Committees; Hearings Before Congressional Committees; and numerous other documents. In fact, a person reading only Spanish could not read Senator Kennedy's speech in the Congressional Record supporting his right to vote since that speech is only printed in English.

7. A person reading and writing only Spanish would therefore not be able to read and understand a large number of documents of local state or national significance which would make him a better-informed voter.

ALFRED AVINS

The undersigned, attorney of record, for petitioner, hereby affirms that the foregoing affidavit is true, under penalty of perjury, pursuant to R. 2106, New York Civil Practice Law and Rules.

Dated: August 16, 1965

ALFRED AVINS

[fol. 7]

SUPREME COURT: NEW YORK COUNTY

Index No. 12412-1965

In the Matter of the Application of

ANTHONY O'KEEFE, PETITIONER

v.

NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maourice J. O'Rourke, and John Cr. Crews, RESPONDENT

AFFIDAVIT

ANTHONY O'KEEFE, being only sworn, desposes and says:

1. I am the petitioner in this case and make this affidavit in support of the motion to restrain the Board of Elections from violating New York State law by registering non-English speaking persons.

2. I have lived in New York City for 30 years, and am a retired journalist by profession. I had, prior to retirement, been active in politics, and at one time was an American Labor Party county committeeman and was on the ballot in primary fights. Within my experience, the large majority of election material in New York City always has been printed only in English, including such things as pamphlets, posters, advertisements in newspapers, etc.

3. I have ascertained from Editor & Publisher Yearbook (1965), that there is only one Spanish language newspaper printed in New York City, viz: *El Diario-Law Prensa*, with an average circulation, Monday through Friday, of 78,289, and on Saturday, of 72,541. By way of contrast, the following information from the 1964 New York World Telegram & Sun World Almanac indi-

cates the daily English language newspapers in New York City and their circulation:

Names of Papers	Daily Circulation (Thousands)	Sunday Cir.
Times	682 M	1305 M
Herald Tribune	360 M	430 M
News	2056 M	3158 M
Post	328 M	256 M
Journal-American	602 M	760 M
World Telegram & Sun	443 M	(None)
Long Island Press	296 M	369 M
Long Island Star Journal	96 M	(None)
Newsday (Nassau Co.)	345 M	(None)

El Dirario-La Prensa is considerably smaller than the English-language papers, even the tabloids. For example, [fol. 8] on Monday, Aug. 16, 1965, El Diario-La Prensa contained 32 pages while the Daily News contained 56 pages. Similar, and in some cases larger, discrepancies, are to be found in the case of other newspapers.

4. I have ascertained from the Radio Advertising Bureau of New York City that there are twenty-four radio stations in New York City of which only three carry Spanish language programs. These three are: WAPO, WHOM, and WLIV. Of the seven major television stations broadcasting in New York City, one carry regular Spanish language programs.

5. On the basis of my over-all experience as a professional journalist for many years, as well as the specific research noted above, I can state that a person knowing only English in New York City has access to far more information about municipal, state, and national government, politics, and current events, than does a person knowing only Spanish.

ANTHONY O'KEEFE

Sworn to before me this day of August, 1965

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR LEAVE TO ADD PARTIES—Filed September 8, 1965

Comes now the plaintiffs in the above-entitled action and move to add as parties the New York City Board of Elections, consisting of James M. Power, Thomas Mallee, John R. Crews, and Maurice J. O'Rourke, as additional defendants, and further moves for leave to file and serve an amended complaint against defendant Nicholas deB. Katzenbach and the New York City Board of Elections, a copy of which is hereby annexed, and further move that service of the summons and amended complaint on additional defendants New York City Board of Elections shall be made by Morris Handel, or in the alternative by the United States Marshall for the Southern District of New York or one of his deputies as he may appoint, and for such other and further relief as to the Court may seem just and proper.

Dated: September 7, 1965

/s/ Alfred Avins
ALFRED AVINS
Attorney for Plaintff

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

ORDER GRANTING LEAVE TO ADD PARTIES AND TO FILE AND SERVE AMENDED COMPLAINT, ETC.—
September 8, 1965

Upon oral motion made by plaintiffs in open court, as supplemented by written motion, for leave to add additional parties, made September 7, 1965, and for other relief, it is

ORDERED, that plaintiff have leave to add as additional parties, defendant the New York City Board of Elections, consisting of James M. Power, Thomas Mallee, John R. Crews, and Maurice J. O'Rourke, and it is

ORDERED, that plaintiff have leave to file and serve an amended complaint against the defendants, and it is

ORDERED, that service of a copy of the summons and amended complaint on additional defendants New York City Board of Elections may be made by Morris Handel, or in the alternative by the United States Marshall for the Southern District of New York, or one of his deputies, and it is

ORDERED, that the hearing on plaintiff's motion for the convening of a three-judge statutory court be, and the same is, continued to September 15, 1965, at 10:00 a.m. and it is

ORDERED, that copies of this order may be served on the defendant and additional defendants personally or by mail.

Dated September 8, 1965

/s/ Alexander Holtzoff
U.S.D.J.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

JOHN P. MORGAN and CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS DeB. KATZENBACH, as Attorney General of the United States, and NEW YORK CITY BOARD OF ELECTIONS: consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION—Filed September 10, 1965

Plaintiffs, by their attorney, Alfred Avins, complaining of the defendant, respectfully allege as follows:

FOR A FIRST CAUSE OF ACTION:

1. Jurisdiction of this Court is invoked under the Voting Rights Act of 1965, Sec. 14(b): and under Title 28, U.S.C., Sections 2201, 2282, and 2284.

2. Plaintiffs are able to read and write the English language and are both duly registered voters of the City and State of New York, County of Kings, and have been, and are now fully qualified to vote under the laws of the State of New York, as well as under the Constitution and laws of the United States, for government officials of the County of Kings, the City of New York, the State of New York, and the United States.

3. The Constitution of the State of New York, Art. II, § 1, provides in pertinent part as follows: ". . . no person shall become entitled to vote . . . unless such person is also able, except for physical disability, to read and

write English." Pursuant thereto, Section 150 of McKinney's New York Election Law enforces this provision.

4. Section 4, subd. (e) (1), (2) Voting Rights Act of 1965, provides:

> (1) Congress hereby declares that to secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to [fol. 12] read, write, understand, or interpret any matter in the English language
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

5. Pursuant to the provisions set forth in Paragraph 4 above, Article II, § 1 of the Constitution of the State of New York, and Section 150 of the Election Law of New York, enacted pursuant thereto, will be rendered unenforceable upon adequate proof of an eighth grade education.

6. Approximately 700,000 persons who have migrated from the Commonwealth of Puerto Rico live in New York City. Of this number, approximately 59 percent read and write only the Spanish language. Many of these Spanish-

speaking residents of New York City are of voting age and live in the County of Kings.

7. Plaintiffs allege that under Section 4(e)(1) and (2) of the Voting Rights Act of 1965, large numbers of Spanish-speaking persons who are unfamiliar with the English language would be entitled to vote in the City of New York and the County of Kings notwithstanding that they would not be qualified to vote under New York law. Because most of the information about political issues in [fol. 13] New York City is printed in the English language, such Spanish-speaking persons would be unfamiliar therewith. The exercise of the franchise by such persons pursuant to federal law, but in violation of state law, will dilute the effect of plaintiff's vote.

8. Section 4(e)(1) and (2) of the Voting Rights Act of 1965 is unauthorized under the Fourteenth Amendment and hence violates the Tenth Amendment, and deprives plaintiffs of their rights under the Fifth Amendment and the Ninth Amendment to the Constitution of the United States.

9. Under the Voting Rights Act of 1965, the Attorney General is authorized to enforce the aforesaid sections of the statute.

10. The Attorney General of the United States has actively enforced Section 4 of the Voting Rights Act of 1965 in respect to those state and local election officials who have refused to comply therewith, and has made statements in substance and effect which indicate that if the New York City Board of Elections refuses to comply, he will proceed to enforce the statute against them.

FOR A SECOND CAUSE OF ACTION:

11. Repeats and realleges paragraphs 1-10 as if set forth herein.

12. Defendant New York City Board of Elections is the agency charged by the law of New York State with registering persons in the City of New York to vote.

13. Under New York State Constitution, Art. II, § 1, and Election Law, Secs. 150, 168, and 201(1), it is the duty of the defendant New York City Board of Elections

to register to vote only such persons as are able to read and write the English language.

14. Nothwithstanding New York law, defendant New York City Board of Elections has announced publicly that it intends to disregard New York law and comply with Sec. 4(e) of the Voting Rights Act of 1965, and on information and belief is actually doing so, by registering persons unable to read and write English.

[fol. 14] 15. In so acting, the defendant New York City Board of Elections is diluting the votes of plaintiffs for the forthcoming municipal election to be held in November, 1965, and for further elections.

16. On information and belief, the defendant New York City Board of Elections is disregarding New York State law and obeying the Voting Rights Act of 1965, because of the fact that the Attorney General of the United States will enforce the said statute against them if they do not comply.

WHEREFORE: plaintiffs pray:

(1) That a Statutory Three-Judge Court District Court be convened pursuant to Sections 2282 and 2284, of Title 28, United States Code;

(2) That this cause be advanced on the docket for a speedy hearing thereof;

(3) That a Declaratory Judgment be issued declaring that Section 4(e)(1) and (2) of the Voting Rights Act of 1965 is in excess of Congress' power to enact and is unconstitutional; and

(4) That an injunction be issued enjoining defendants from taking any steps to enforce, execute, obey or comply with the aforesaid statutory provisions; and such other and further relief as to the Court may seem just and proper.

/s/ Alfred Avins
ALFRED AVINS
c/o Suite 311
2000 F Street, N.W.
Washington 6, D.C.
Attorney for Plaintiffs

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-1965

[File Endorsement Omitted]

[Title Omitted]

NOTICE TO ADMIT—Filed September 15, 1965

SIRS:

Please take notice, that you are hereby requested to admit that the annexed copy of the New York City Record, dated June 23, 1965, purporting to contain the official New York City Budget for the fiscal year 1965-1966, constitutes a true copy of the Official Journal of the City of New York for the aforesaid date, and in fact contains a true copy of the official expense budget of New York City for fiscal year 1965-1966, as published by New York City, or to serve your denial not later than ten days from the service of this notice.

Dated: September 13, 1965

/s/ Alfred Avins
ALFRED AVINS
Attorney for Plaintiffs
Suite 311
2000 F Street, N.W.
Washington, D. C.

[Proof of Service
(omitted in printing)]

[fol. 16]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-1965

[File Endorsement Omitted]

[Title Omitted]

NOTICE TO ADMIT—Filed September 15, 1965

SIRS:

Please take notice, that you are requested to admit that the annexed copy of the New York City Record, dated August 13, 1965, constitutes a true copy of the Official Journal of the City of New York for the aforesaid date, or to serve your denial not later than ten days from the service of this notice.

Dated: September 13, 1965.

/s/ Alfred Avins
ALFRED AVINS
Attorney for plaintiffs
Suite 311
2000 F Street, N.W.
Washington, D. C.

[Proof of Service
(omitted in printing)]

[fol. 17]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 1915-65

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR SUMMARY JUDGMENT—Filed September 20, 1965

Comes now the plaintiffs, and move this Court for summary judgment against the defendants, for the relief demanded in the amended complaint. In support of the said motion, there is herewith annexed a memorandum of law consisting of the plaintiffs' points and authorities. In addition, in support of this motion, plaintiffs annex copies of a notice to admit dated August 25, 1965, in *O'Keefe* v. *New York Board of Elections*, U.S. District Court, Southern District of New York, 65 Civ. 2554, and an affidavit of Anthony O'Keefe, sworn to 19 August 1965, and an affidavit of Alfred Avins, affirmed August 16, 1965 both annexed to the said notice to admit, plus a response of the New York City Board of Elections sworn to 1 September 1965, the original copies of which are on file in the office of the Clerk, United States District Court, Southern District of New York. Plaintiffs also respectfully request that this Court read in support of this motion copies of the New York City Record of June 23, 1965, and August 13, 1965, copies of which have heretofore been filed accompanied by a notice to admit, with the Clerk of this Court. In addition, plaintiffs state in support of the said motion for summary judgment that the New York City Board of Education Adult Education Division conducts classes to teach English in its schools without any money charge or payment during both the day and the evening for foreign language immigrants who come to New York City to live, and that a native

of Puerto Rico who migrated to New York City and spoke only Spanish would be entitled to attend such classes free of charge and learn to read and write English, if he so desired.

Dated: September 17, 1965.

/s/ Alfred Avins
ALFRED AVINS
Attorney for plaintiffs
Suite 311, 2000 F St. N.W.
Washington 6, D. C.

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 18]

ATTACHMENTS TO MOTION FOR SUMMARY JUDGMENT

NOTICE TO ADMIT

SIRS:

PLEASE TAKE NOTICE, that you are hereby requested to admit the truth of the matters set forth in the annexed affidavits of ALFRED AVINS, and ANTHONY O'KEEFE, made for Supreme Court, New York County, pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, or to serve a refusal to admit not later than ten days from today.

Dated: August 25, 1965

/s/ ALFRED AVINS

TO: Corporation Counsel
New York City

Affidavit of Anthony O'Keefe

ANTHONY O'KEEFE, being duly sworn, deposes and says:

1. I am the petitioner in this case and make this affidavit in support of the motion to restrain the Board of Elections from violating New York State law by registering non-English speaking persons.

2. I have lived in New York City for 30 years, and am a retired journalist by profession. I had, prior to retirement, been active in politics, and at one time was an American Labor Party county committeeman and was on the ballot in primary fights. Within my experience, the large majority of election material in New York City always has been printed only in English, including such things as pamphlets, posters, advertisements in newspapers, etc.

3. I have ascertained from Editor & Publisher Yearbook (1965), that there is only one Spanish language newspaper printed in New York City, viz: *El Diario-La Prensa*, with an average circulation, Monday through Friday, of 78,289, and on Saturday, of 72,541. By way of contrast, the following information from the 1964 New York World Telegram & Sun World Almanac indicates the daily English language newspapers in New York City and their circulation:

[fol.19]

Names of Papers	Daily Circulation (Thousands)	Sunday Cir.
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Long Island Star Journal	96 M	(None)
Newsday (Nassau Co.)	345 M	(None)

El Diario-La Prensa is considerably smaller than the English-language papers, even the tabloids. For example,

on Monday, Aug. 16, 1965, El Diario-La Prensa contained 32 pages while the Daily News contained 56 pages. Similar, and in some cases larger, discrepancies, are to be found in the case of other newspapers.

4. I have ascertained from the Radio Advertising Bureau of New York City that there are twenty-four radio stations in New York City of which only three carry Spanish language programs. These three are: WAPO, WHOM, and WLIV. Of the seven major television stations broadcasting in New York City, one carries regular Spanish language programs.

5. On the basis of my over-all experience as a professional journalist for many years, as well as the specific research noted above, I can state that a person knowing only English in New York City has access to far more information about municipal, state, and national government, politics, and current events, than does a person knowing only Spanish.

/s/ ANTHONY O'KEEFE

Sworn to before me this 9th day of August, 1965

HERMON SIMON
Notary Public

AFFIDAVIT OF ALFRED AVINS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

ALFRED AVINS, being duly sworn, deposes and says:

1. I am attorney for petitioner and make this affidavit in support of the annexed motion. This affidavit is made to illustrate the reasonableness of the New York law in requiring voters to be able to read and write English.

[fol. 20] 2. I have investigated the publications of the State of New York which deal with governmental affairs

and which an informed voter might want to read to keep himself well informed of what is going on in State government. The large majority are printed only in the English language. The following list of materials printed only in the English language is illustrative, rather than exhaustive: Governor's messages; Journal of the Legislature; Reports of Legislative Committees; Bills introduced into the Legislature; Legislative Manual which contains information about State Government (1364 pages) and is published annually; New York Red Book (965 pages); Regulations published by the New York Secretary of State; State Department administrative reports; Reports of sundry state agencies to the Governor printed for public inspection.

3. The following additional materials are published only in English: Constitution of New York State; Constitutional amendments; Laws of New York State, Local Laws (Municipal Ordinances) of New York City; Reports of New York Courts and proceedings therein; Reports of the Judicial Conference.

4. Debates in the State Legislature, New York City Council, and U.S. Congress are conducted only in English language, and all proceedings in the New York and federal courts are conducted only in the English language.

5. I have ascertained from the City Record office that all of its material is published only in English. This includes the daily City Record, including the minutes of the City Council and Board of Estimate, (a Specimen copy of August 13, 1965 is included herewith as an exhibit); and the City Budget (a Specimen copy for Fiscal Year 1965-66 is included as an exhibit); Real Estate Tax Evaluations; Directory (Green Book); Charter; Local Laws; Department Regulations, and other official city documents.

6. On the federal level, material published only in English includes most official publications dealing with the Federal Government. Included as illustrative are: U.S. Congressional Record; Code of Federal Regulations; U.S. Constitution and U.S. Code; Statutes at Large; Reports of Federal Courts; Congressional Directory; Reports of Administrative Agencies such as National Labor Relations

Board, Federal Communications Commission, etc.; Reports of Congressional Committees; Hearings Before Congressional Committees; and numerous other documents. In fact, a person reading only Spanish could not read Senator Kennedy's speech in the Congressional Record supporting his right to vote since that speech is only printed in English.

[fol. 21] 7. A person reading and writing only Spanish would therefore not be able to read and understand a large number of documents of local, state or national significance which would make him a better-informed voter.

/s/ ALFRED AVINS

The undersigned, attorney of record, for petitioner, hereby affirms that the foregoing affidavit is true, under penalty of perjury, pursuant to R. 2106, New York Civil Practice Law and Rules.

Dated: August 16, 1965

/s/ ALFRED AVINS

RESPONSE TO REQUEST TO ADMIT

In response to petitioner's request to admit the truth of certain matters set forth in affidavits of petitioner and of Alfred Avins, his attorney, which request was dated and served August 25, 1965, respondent states as follows:

1. With respect to the matters set forth in the affidavit of petitioner—

(a) Respondent admits the matter set forth in par. 1;

(b) Respondent cannot admit the matter set forth in par. 2 because respondent has no knowledge of petitioner's political activities or experience;

(c) Respondent denies "that there is only one Spanish language newspaper printed in New York City, viz: *El Diario-La Prensa*," as set forth in par. 3, since there are at least two other Spanish language newspapers printed in N.Y. City, but admits the circulations of the English language papers as set forth in said par. 3;

(d) Respondent denies that of the seven major television stations in New York City, only one carries regular Spanish language programs, and further denies that only three radio stations in New York City carry Spanish language programs—all as set forth in par. 4;

(e) Respondent cannot admit to the validity of the opinion, set forth in par. 5, that, based on petitioner's experience, persons literate in Spanish only have access to far less information than persons literate only in English, because a person literate only in Spanish—and, therefore, disqualified as a voter under the N.Y. Election Law—may understand English sufficiently well to enjoy all of the English language programs on radio and television. In addition, Mr. O'Keefe overlooks the fact that *quality* of reporting on radio, television and in newspapers, can be of far greater importance to an informed electorate than quantity.

2. With respect to the matters set forth in the affidavit of Alfred Avins, petitioner's counsel:

(a) Respondent admits facts setting forth the identity of the affiant and the purpose of his affidavit, all as set forth in par. 1.

(b) Respondent admits that a large majority of the official publications of the State of New York which deal with governmental affairs are printed only in the English language but cannot admit that voters normally keep themselves informed by reading: the Journal of the Legislature, Reports of Legislative Committees, Bills introduced

into the Legislature, the Legislative Manual, the New York Red Book, Regulations and Administrative Reports of State Agencies—all as specified in par. 2;

[fol. 22] (c) Respondent denies that the N.Y. State Constitution and amendments, N.Y. State and local laws, reports of judicial proceedings in N.Y. State are published only in English, as requested in par. 3;

(d) Respondent admits that legislative debates and judicial proceedings in N.Y. State are conducted only in the English language, as requested in par. 4;

(e) Respondent admits that all material printed in the City Record is published only in English, as requested in par. 5;

(f) Respondents admits that official United States Reports, such as the Congressional Record, Code of Federal Regulations, Statutes at Large, etc., are published only in English, as requested in par. 6;

(g) Respondent cannot admit the validity of the conclusory opinion set forth in par. 7 that a person reading and writing only Spanish—and, therefore, presumably unable to resort to original source material as published by governmental agencies, would "not be able to read and understand a large number of documents of local, state or national significance which would make him a better-informed voter"—because it is apparent that resort to both written and oral reports, in Spanish and English, summarizing such data would enable a person to understand the significance thereof even though he were not fully literate in English to the point that he could both read and write English. Respondent recognizes the indisputable fact that there are many thousands of persons who, through the practical necessity of everyday living in this State

fully understand English but have been unable to acquire an education in reading and writing that language. Radio, television and other secondary sources would fully inform such interested persons of the significance of important public documents and judicial proceedings—even more so than is the case with persons literate in English who are interested in neither primary nor secondary sources publishing government affairs.

LEO A. LARKIN
Corporation Counsel
City of New York
Attorney for Respondent

By /s/ MORRIS EINHORN
Asst. Corporation Counsel

Sworn to before me this 1st day of September, 1965.

DENNIS J. CONROY
Notary Public

[fol. 23]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

JOHN P. MORGAN and CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS deB. KATZENBACH, as Attorney General of the United States, and NEW YORK CITY BOARD OF ELECTION, consisting of JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, and JOHN CREWS, ET AL., DEFENDANTS

UNITED STATES OF AMERICA, INTERVENOR

ORDER GRANTING UNITED STATES LEAVE TO INTERVENE—
September 20, 1965

Upon the oral motion of the United States of America for leave to intervene in this action, and the Court being of the opinion that the United States has the right to intervene herein under the provisions of 28 U.S.C. § 2403 and Rule 24(a) of the Federal Rules of Civil Procedure, it is

ORDERED that the motion of the United States of America for leave to intervene be and the same is hereby granted.

Dated: September 20, 1965

/s/ Alexander Holtzoff
United States District Judge

[fol. 24] * * *

[fol. 25]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil Action No. 1915-65

[File Endorsement Omitted]

JOHN P. MORGAN and CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS deB. KATZENBACH, as Attorney General of the United States, and NEW YORK CITY BOARD OF ELECTION, consisting of JAMES M. POWER, THOMAS MALEE, MAURICE J. O'ROURKE, and JOHN R. CREWS, ET AL., DEFENDANTS

DESIGNATION OF JUDGES TO SERVE ON THREE JUDGE DISTRICT COURT—September 21, 1965

The Honorable Alexander Holtzoff, United States District Judge for the District of Columbia, having notified me that a complaint has been filed in said court to enjoin the enforcement of Section 4(e) of the Act approved on August 6, 1965, Public Law 89-110, on the ground of its repugnance to the Constitution of the United States, it is

ORDERED pursuant to Sections 2282 and 2284 of Title 28, United States Code, that the Honorable Carl McGowan, United States Circuit Judge for the District of Columbia Circuit, and the Honorable Joseph C. McGarraghy, United States District Judge for the District of Columbia, are hereby designated to serve with the Honorable Alexander Holtzoff, United States District Judge, as members of the court to hear and determine this action.

/s/ Illegible
Chief Judge
United States Court of Appeals
for the District of Columbia Circuit

Dated: Sep. 21, 1965.

* * * *

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

OBJECTION TO REQUESTS FOR ADMISSION—
Filed September 23, 1965

In response to the written requests, served upon the defendant on September 15, 1965, that the defendant admit that the *New York City Record* dated June 23, 1965, and the *New York City Record* dated August 13, 1965, are true copies of the official journal of the City of New York for those dates, the defendant objects to making such admission upon the ground that the *New York City Records* for those dates and their contents are irrelevant to any issue in this case.

/s/ John C. Conliff, Jr.
JOHN C. CONLIFF, JR.
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT
Department of Justice
Attorneys for Defendant

[fol. 27]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

PLAINTIFFS' SUPPLEMENTARY STATEMENT TO MOTION FOR SUMMARY JUDGMENT—Filed September 27, 1965

Plaintiffs desire to supplement their papers on their motion for summary judgment by filing certain statistics and an exhibit from the official records of the New York City Board of Education relative to the study and teaching of English to natives of Puerto Rico who migrate to New York City, and to thus aid this Court in taking judicial notice of these facts, which cannot be disputed.

The Board of Education of the City of New York has had considerable experience in the teaching of English to natives of Puerto Rico whose mother tongue was Spanish and who migrated without being able to read, write, or speak English to New York City. Several years ago, the Board completed a number of studies of this problem, which have been published, and are entitled:

WHO ARE THE PUERTO RICAN PUPILS IN THE NEW YORK CITY SCHOOLS—Puerto Rican Study, Research Report, Board of Education, 1956, by Samuel M. Goodman, Lorraine K. Diamond, and David J. Fox.

DEVELOPING A PROGRAM FOR TESTING PUERTO RICAN PUPILS IN THE NEW YORK CITY PUBLIC SCHOOLS (1959), by J. Cayce Morrison.

THE PUERTO RICAN STUDY, 1953-1957 (A Report on the Education and Adjustment of Puerto Rican Pupils in the Public Schools of the City of New York), Sponsored by the Board of Education of the City of New York

under a grant-in-aid from the Fund for the Advancement of Education (1958), J. Cayce Morrison, Director, 265 pages.

The last-mentioned study states at p. 238: "In October 1956 children rated as non-English speaking were found in 746 of the 817 public schools. . . ."

The following figures relating to adult education of the Board of Education of the City of New York are found in BOARD OF EDUCATION OF NEW YORK CITY, ANNUAL FINANCIAL AND STATISTICAL REPORT, 1963-1964, p. 18, which is the latest official report of the Board of Education:

Activity	Average Daily or Nightly Attendance	Cost of Instruction		Other Expenses of Education		Total	
		Proper Salaries & Expenses	Per Capita Per Annum	Administrative, Operation, etc.	Per Capita Per Annum	Total	Per Capita Per Annum
Evening Elementary	13,542	$1,331,906	$98.35	$306,958	$22.67	$1,638,864	$121.02
Evening High Schools	9,397	2,096,906	223.15	347,935	37.02	2,444,841	260.17
Evening Trade Schools	7,017	934,493	131.49	272,538	38.35	1,207,032	169.84
Day Classes for Adults	3,082	217,067	70.43	8,870	2.88	225,937	73.31
Summer Day Schools	26,989	1,318,172	48.84	155,346	5.76	1,473,519	54.60
Summer Evening Schools	6,992	196,271	28.07	31,040	4.44	227,312	32.51

While the Board of Education keeps no precise figures, and cannot by the nature of things do so, an official thereof in charge of adult education estimated that between 60% and 85% of the adults enrolled with it were foreign [fol. 29] or Puerto-Rican born and were enrolled for the purpose of learning or improving their English, depending on the class.

There is herewith enclosed the latest bulletin, 1965-1966, published by the Board of Education of New York City, listing adult education classes.

Respectfully submitted,

/s/ Alfred Avins
ALFRED AVINS
Attorney for plaintiffs
Suite 311
2000 F Street, N.W.
Washington, D. C.

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

ANSWER—Filed October 6, 1965

Answering the petition of John P. and Christine Morgan, defendant New York City Board of Elections, by its attorney, Leo A. Larkin, Corporation Counsel of the City of New York, shows:

First Defense

The petition fails to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

Second Defense

The petition fails to state a claim against defendant upon which relief can be granted.

[fol. 31] *Third Defense*

Admits the allegations contained in par. 1, except denies statutory authority for the proceeding commenced by petitioners herein; admits the allegations contained in pars. 2, 3, 4, 9, 12, 13, and 14, but denies each and every other allegation of the petition.

Dated: September 28, 1965.

/s/ Leo A. Larkin M.E.
LEO A. LARKIN
Corporation Counsel of the
City of New York

[Certificate of Service Omitted in printing]

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT—
Filed October 6, 1965

Comes now the defendant NEW YORK CITY BOARD OF ELECTIONS and, a motion for summary judgment against the defendants having been made by plaintiffs, the return date of which has not been specified, said defendant NEW YORK CITY BOARD OF ELECTIONS cross-moves—on such return date as may be fixed by the Court for the hearing of said motion for summary judgment—for judgment on the pleadings pursuant to Rule 12(c) dismissing the complaint for failure to state a claim upon which relief can be granted and for failure to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

Dated: September 30, 1965

/s/ Leo A. Larkin M.E.
LEO A. LARKIN, Corporation Counsel
of the City of New York,
Attorney for Defendant
Board of Elections

[fol. 33]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

ANSWER OF DEFENDANTS NICHOLAS DEB. KATZENBACH AND UNITED STATES OF AMERICA—Filed October 7, 1965

Nicholas deB. Katzenbach and the United States of America, defendants herein, answer the allegations contained in each numbered paragraph of the complaint, as amended and filed on September 7, 1965, as follows:

1. Jurisdiction of this Court is admitted.
2. The allegations of paragraph 2 are admitted.
3. The allegations of paragraph 3 are admitted.
4. The allegations of paragraph 4 are admitted.
5. The allegations of paragraph 5 are denied, but it is admitted by virtue of the provisions of Section 4(e) of [fol. 35] the Voting Rights Act of 1965, section 1 of Article II of the Constitution of New York and section 150 of the Election Code of New York are unconstitutional and unenforceable insofar as they purport to disqualify for voting any person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any state or territory, the District of Columbia, or the Commonwealth of Puerto Rico, in which the predominant classroom language was other than English.
6. The allegations of paragraph 6 are denied, but it is admitted that there are approximately 700,000 persons residing in New York City who have migrated or whose parents, or one of them, migrated from the Commonwealth of Puerto Rico. It is further admitted that many Spanish-speaking residents of New York City who are of voting age live in the County of Kings.

7. The allegations of paragraph 7 are admitted insofar as they allege that Spanish-speaking persons who live in the County of Kings, and who cannot read or write in the English language, and who would not be entitled to vote by the terms of Article II, section 1 of the Constitution of New York and section 150 of the Election Code [fol. 36] of New York, are nonetheless entitled and qualified to vote by virtue of Section 4(e) of the Voting Rights Act of 1965. It is denied that Spanish-speaking persons in New York City are unfamiliar with the political issues in the city and do not have adequate sources of information regarding such issues. Defendants do not answer the allegation that exercise of the franchise by persons qualified to vote under Section 4(e) of the Voting Rights Act of 1965 will dilute the effect of plaintiffs' vote, upon the ground that such allegation is not one of fact but is a conclusion of law.

8. The allegations of paragraph 8 are denied.

9. The allegation of paragraph 9 is admitted.

10. The allegation of paragraph 10 that the Attorney General of the United States has actively enforced Section 4(e) of the Voting Rights Act of 1965 is admitted; all other allegations in paragraph 10 are denied.

11. Insofar as paragraph 11 repeats and realleges the allegations of paragraphs 1 through 10 of the complaint, the defendants make the same answers set forth in paragraphs 1 through 10 above.

12. The allegations of paragraph 12 are admitted.

13. It is admitted that under the constitution and election laws of the State of New York it is the duty of the [fol. 37] defendant New York City Board of Elections to register to vote only such persons as are able to read and write the English language, except that under the Constitution and laws of the United States they may not refuse to register a person, for lack of such ability, who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any state or territory, the District of Columbia, or the Commonwealth of Puerto Rico, in which the predominant classroom language was other than English.

14. The allegations of paragraph 14 are admitted.
15. The allegations of paragraph 15 are neither admitted nor denied inasmuch as they are not allegations of fact but are conclusions of law.
16. The allegations of paragraph 16 are denied.

/s/ John Doar
JOHN DOAR
Assistant Attorney General

/s/ John C. Conliff, Jr.
JOHN C. CONLIFF, JR.
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT, Attorney
Department of Justice

[fol. 38]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT—
Filed October 14, 1965

The plaintiffs having heretofore filed their motion for summary judgment, the defendants Nicholas deB. Katzenbach and the United States of America hereby file their cross-motion for summary judgment upon the ground that there is no substantial controversy regarding any material issue of fact in this case, and that the defendants are entitled to judgment as a matter of law.
[fol. 40] This cross-motion is based upon all of the pleadings and other papers heretofore filed in the case, and upon facts of which this Court may take judicial notice, all of which establish, without substantial controversy, that:

1. The only "American Flag Schools" within the meaning of Section 4(e) of the Voting Rights Act of 1965, in which a significant number of adult citizens of the United States have successfully completed the sixth primary grade in which the classroom language was other than English, are schools in Puerto Rico where the predominant classroom language is Spanish.

2. Congress could reasonably determine that in states in which literacy is a requirement for voting, the quality of the electorate in terms of education, political judgment, and moral character is not materially affected by providing that literacy shall be in either English or Spanish rather than exclusively in English.

3. Congress could reasonably determine that whenever there is a substantial body of voters who are illiterate in

the English language, but literate in another language, public officials, political candidates, and the various news media quickly and easily adapt to provide such voters substantially the same information on the issues and the candidates as is available to other voters.

[fol. 41] 4. Congress could reasonably determine that no undue burden would be placed upon state agencies and officials in adjusting their electoral processes to permit persons illiterate in English to vote.

5. Were it not for Section 4(e), the effect of the New York constitutional provision and statute here drawn in question would be—and indeed, previously was—to disenfranchise Puerto Rican residents of New York by reason of their having been educated in Puerto Rico.

6. There is no compelling reason in State policy for the State of New York, in fixing qualifications to vote, to distinguish between Puerto Ricans educated in schools in Puerto Rico in which, with the approval of Congress, Spanish is the predominant language, and Puerto Ricans educated in schools in Puerto Rico in which English is the predominant language.

7. Congress could reasonably determine, inasmuch as all public schools in Puerto Rico use Spanish as the predominant classroom language, that the effect of the New York constitutional provision and statute is to discriminate unreasonably against American citizens in the voting process upon the basis of their national origin.

8. There was a reasonable basis for Congress to determine that exclusion of Puerto Ricans from voting upon the ground of their illiteracy in English, although they [fol. 42] had completed six grades in a Spanish-language school in Puerto Rico, unreasonably and adversely affected the status and welfare of such Puerto Ricans as citizens of the United States and as former residents of a territory of the United States.

Upon the basis of the foregoing facts and in accordance with the rules of law discussed in the brief heretofore filed by the United States, it follows that Section 4(e) of the Voting Rights Act of 1965 constitutes appropriate legislation under Section 5 of the Fourteenth Amendment. This being so, the plaintiff has failed to

establish any basis for injunctive relief against the Attorney General of the United States and summary judgment should be rendered upon the pleadings.

It is the position of the defendants herein that there is a sufficient basis in the pleadings for a decision upon the constitutionality of the statute here in question without recourse to affidavits or other factual evidence. Inasmuch as plaintiffs have filed affidavits in support of their motion for summary judgment, defendants are attaching hereto, affidavits in support of their position that the statute is constitutional, which may be considered if the Court gives consideration to plaintiffs' affidavits.

/s/ John C. Conliff, Jr.
JOHN C. CONLIFF, JR.
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT, Attorney,
Department of Justice

Attorneys for Nicholas deB.
Katzenbach and for the United
States of America

[fol. 43]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 44] • • •

[fol. 45]

ATTACHMENTS TO CROSS-MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT

COUNTY OF NEW YORK)
) ss.:
STATE OF NEW YORK)

My name is THOMAS MALLEE. I live at 252 East 61st Street, New York, New York. I am 78 years old and have lived in New York City all my life. I am a Commissioner of Elections and Secretary of the Board of Elections in the City of New York. I am one of the two Republican members of the four-man Board of Elections.

The Board of Elections supervises voter registration and the conduct of all elections in the City of New York. The Board prescribes the forms and procedures, in accordance with State law, to be used by all election officials in New York City. The Board distributes to the appropriate local election officials the materials to be used in the voter registration process throughout New York City.

Each of the five boroughs of New York City has a Chief Clerk for elections who supervises and implements in his borough the policies and procedures of the Board of Elections. For each of the over 700 election districts in New York City there is a board of elections consisting of four inspectors. These inspectors accept and pass upon applications for voter registration.

An applicant for voter registration may present himself at the central office in his borough at most times throughout the year. In addition, there are special local registration days when the district boards accept applica-
[fol. 46] tions at polling places. The only such local registration since August 6, 1965 occurred on September 24, 25 and 30 and October 1 and 2. Also during August of this year mobile units were placed at various locales in the election districts at which the local boards received applications for registration.

Prior to passage of the Voting Rights Act of 1965, on August 6, 1965, a person applying for registration to vote in New York City had to demonstrate that he had completed six grades at an approved school in which English was the language of instruction or, in the alternative, that he had passed a literacy test in English prepared by the New York Board of Regents and administered in New York City under the supervision of the Board of Education. A copy of the form of affidavit used by applicants to prove they met the education requirements is appended hereto as Attachment A. Copies of two versions of the Regents' literacy test are appended hereto as Attachments B and C. If an applicant could produce a school diploma or certificate showing that he satisfied the education requirement, no affidavit was necessary. The district board completed the prescribed application form for registration upon oral inquiry of the applicant, who then signed the form. A copy of the prescribed application form is attached as Attachment E to this affidavit.

All the procedures employed prior to passage of the Voting Rights Act of 1965 are still in use for applicants who qualify under the English literacy provisions of State law. On August 12, 1965 the Board of Elections, upon the advise of Leo Larkin, Corporation Counsel for the City of New York, prepared and sent to all Chief Clerks a letter stating that Section 4(e) of the Voting Rights Act of 1965 was in full force and effect. Attached [fol. 47] to this letter was a form of affidavit to be used by persons who now were eligible to register because they had attended at least six grades of an approved school in any State, Territory, or the Commonwealth of Puerto Rico where the language of instruction was other than English. This policy and procedure was immediately disseminated to the local boards of elections by the Chief Clerks. Attachment D hereto is a copy of the Board's letter to the Chief Clerks.

The Board of Elections is in the process of determining how many persons have qualified for registration by completing the new affidavit. These affidavits are the only evidence available to the Board of Election that an applicant qualified by reason of the provisions of Section 4 (e) of the Voting Rights Act of 1965. If an applicant

proved he met the non-English education requirement by producing a school certificate or diploma, there would be no difference between his application form and the application forms of English-speaking applicants.

/s/ Thomas Mallee
THOMAS MALLEE

Sworn to before me this 6th day of October, 1965.

/s/ James Siket, Jr.
JAMES SIKET, JR., Notary Public

State of New York No. 31-8993700
Qualified in New York County
Commission Expires March 30, 1966

[fol. 48] AFFIDAVIT

COUNTY OF NEW HAVEN)
) SS.:
STATE OF CONNECTICUT)

JOHN F. GRIFFIN, after first being duly sworn, did depose and say:

My name is JOHN F. GRIFFIN. I am Assistant Town Clerk for the City of New Haven, Connecticut, an office I have held since January 1964. My duties include attending sessions of the Board of Admissions for Electors in New Haven at times when the Town Clerk is unable to attend. In connection with these duties I have become familiar with voter registration procedures in New Haven.

Applications for voter registration in New Haven are received and passed upon by the Board of Admissions for Electors. This Board is made up of the Board Selectmen of New Haven and the Town Clerk. An applicant for

registration, except for certain service men and physically disabled, must appear personally before the Board. He must demonstrates his literacy by reading a short passage from the Constitution of the State of Connecticut. He must state under oath that he meets the residence requirements under Connecticut law and that all of the information he provides about himself is the truth. He orally provides biographical data which is placed on an application form. A copy of the Standard application form is appended hereto as attachment A.

Shortly after passage of the Voting Rights Act of 1965 my office was advised by the office of the Secretary of the State of Connecticut to comply with the provisions of [fol. 49] Section 4 (e) of the Voting Rights Act of 1965. The Board of Admission in New Haven thereafter prepared a written form on which applicants could show that they attended six grades in an approved school in a State or Territory or the Commonwealth of Puerto Rico where the language of instruction was other than English. The form is in English with a Spanish translation included. A copy of this form is appended hereto as attachment B. These forms have been available for use since sometime in the latter part of September. Prior to that time the Board had no occasion to implement Section 4 (e) of the Voting Rights Act. Since the forms were made available, approximately four or five persons, and certainly no more than ten, have qualified by signing them. The signed statement is attached to and filed with the elector's application form.

/s/ John F. Griffin
JOHN F. GRIFFIN

Sworn and subscribed to before me on this 6th day of October, 1965

/s/ Anna V. Daly
Notary Public
New Haven, Conn.

My Commission Expires April 1, 1969

[fol. 50] AFFIDAVIT

COUNTY OF)
) SS.:
STATE OF CONNECTICUT)

WILLIAM KELLER, after first being duly sworn, did depose and say:

My name is WILLIAM KELLER. I live at 2170 Park Avenue, Bridgeport, Connecticut. I am 45 years old and am in the insurance business in Bridgeport. I am also Town Clerk for the City of Bridgeport, an office I have held for the past eight years.

Applications for voter registration in Bridgeport are received and passed upon by the Board of Admissions for Electors. This Board is made up of the Board of Selectmen of Bridgeport and the Town Clerk. An applicant for registration must appear personally before the Board. He must demonstrate his literacy by reading three or four lines from a printed card bearing an excerpt from the Constitution of the State of Connecticut. He must state under oath that he meets the residence requirements under Connecticut law and that all of the information he provides about himself is the truth. He then orally provides biographical data which is placed on a questionnaire.

[fol. 51] Shortly after passage of the Voting Rights Act of 1965 my office was advised by the Secretary of State of the State of Connecticut to comply with the provisions of Section 4 (e) of the Voting Rights Act and allow persons to register irrespective of their literacy in English if they had completed six grades at an approved school in a State or Territory or the Commonwealth of Puerto Rico where the language of instruction was other than English. The Bridgeport Board of Admissions thereupon instituted the practice of exempting from the English literacy tests persons who signed a form of oath to the effect that they completed six grades at a non-English language school within the meaning of Section 4 (e) of the Voting Rights Act. The one member of the Board who speaks

Spanish or a Spanish-speaking clerk would explain the oath and the procedure to the affected applicants. A copy of the form of affidavit is appended hereto as Attachment A.

To date four applicants have qualified to vote in Bridgeport by reason of Section 4 (e).

/s/ William Keller
WILLIAM KELLER

Sworn to before me this 7th day of October, 1965.

/s/ Marie Giannini
Notary Public

[fol. 52] AFFIDAVIT

COUNTY OF HARTFORD)
) ss.: Hartford, Oct. 7, 1965
STATE OF CONNECTICUT)

ROBERT GALLIVAN, after first being duly sworn, did depose and say:

My name is ROBERT GALLIVAN. I live in Hartford, Connecticut. I am Town and City Clerk for the City of Hartford, a position I have held since 1960. From 1949 until 1960 I was Assistant Town Clerk.

Applications for voter registration in Hartford are received and passed upon by the Board of Admissions for Electors. This Board is made up of the Board of Selectmen of Hartford and Town Clerk. An applicant for voter registration must appear personally before the Board. He must demonstrate his literacy by reading a short passage from the Connecticut Statutes which is pre-selected by the Board. The Board tries to select passages that may be read easily. The applicant must state under oath that he meets the residence requirements under Con-

necticut law and that all of the information he provides about himself is the truth. He orally provides biographical data which is placed on a standard application form which the applicant signs. A copy of the standard application form is appended hereto as attachment A.

Shortly after passage of the Voting Rights Act of 1965 my office was advised by the office of the Secretary of State of the State of Connecticut to comply with the pro- [fol. 53] visions of Section 4 (e) of the Voting Rights Act and permit persons to whom it applies to register without regard to their literacy in English. Since passage of the Voting Rights Act on August 6, 1965 the Hartford Board has had two sessions for registration, one on September 1 and another on October 6. These session ran from 9 A.M. until 8 P.M. On those days the Board employed a Spanish interpreter to ask questions of Spanish-speaking applicants. The interpreter elicited the necessary information regarding the completion of six grades of education and if the applicant thereby qualified, a statement to this effect was typed on the back of his standard application form. The interpreter also elected from the applicant all the necessary biographical data required on the standard form and explained to the applicant that he must swears to the truth of all the information he provided. The applicants who so qualified were not required to read in English. Approximately fifty persons qualified to vote by reason of Section 4 (e) during those two days of registration. Four more days of registration will take place from October 13 through October 16.

Attachment B hereto is an application form containing the statement added to the forms of persons who qualify under Section 4 (e).

/s/ Robert Gallivan
ROBERT GALLIVAN

Sworn to before me this 7th day of October, 1965

/s/ Robert D. Delaney
Notary Public

My Commission Expires March 31, 1968

[fol. 54] AFFIDAVIT

COUNTY OF NEW YORK)
) ss.:
STATE OF NEW YORK)

STANLEY ROSS, after being duly sworn, did depose and say:

My name is STANLEY ROSS. I am the editor of the Spanish language newspaper, "El Eiempo," the offices of which are at 78 Fifth Avenue, Manhattan, New York.

El Tiempo is a weekly printed entirely in Spanish with a circulation of approximately 43,000. As of October 15, 1965, the paper will become a daily.

It is a general newspaper and contains such items as international, national, and local news, editorials, sports news, and other articles. We run a political column and as a public service print news regarding all candidates for elective office. For example, I have appended as attachment A reprints of articles on John V. Lindsay and Tim Costello which have appeared in El Tiempo. We do take an editorial position on political issues. Candidates are welcome to purchase advertising space in El Tiempo. It is my opinion that readers of my paper would be well informed on local, national, and international news.

The paper subscribes to the United Press International wire service from which we receive reports in both Spanish and English. We also subscribe to several non-wire minor news services whose items we receive by mail in [fol. 55] both Spanish and English. The English news service reports and items and any press releases or information we receive in English from local and state political leaders and office holders are translated into Spanish for publication.

The following Spanish newspapers are published in New York City:

Name	Approximate Circulation
1. El Diario-La Pensa (daily)	75,000
2. El Tiempo (weekly)	43,000
3. El Mundo Americano (daily)	10,000
4. Actualidad (weekly)	5,500

The above circulation figures are claims of the publishers with the exception of El Diario, whose circulation is reported by the Audit Bureau of Circulation. In addition to the above, Temas, a slick monthly with a claimed circulation of 8,500, is also published in Spanish in New York City. Several Spanish language magazines which are printed in Puerto Rico are also circulated in New York City.

To the best of my knowledge there are roughly 750 civic organizations in the Spanish-speaking community in New York City.

/s/ Stanley Ross
STANLEY ROSS

Sworn and subscribed to before me this 8th day of October, 1965.

/s/ Edward Kozlowski
Notary Public

EDWARD KOZLOWSKI
Notary Public, State of New York
No. 24-2187350
Qualified in Kings County
Term Expires March 30, 1967

[fol. 56] AFFIDAVIT

COUNTY OF NEW YORK)
) ss.:
STATE OF NEW YORK)

MR. A. L. ROSENTHAL, after being duly sworn, did depose and say:

My name is A. L. Rosenthal. I am the comptroller for the Spanish language newspaper, "El Diario-La Prensa," the offices of which are located at 164 Duane Street, Manhattan, New York.

El Diaria-La Prensa is published daily except Saturday. The Sunday edition is placed on the newsstands on Saturday. Circulation is approximately 75,000 per day. I would estimate that we have a "pass on readership" of about 300,000 per day. The paper is printed entirely in Spanish except for the lead editorial which is printed in both English and Spanish. We are a general newspaper featuring news and commentary on the local, state, national, and international levels. We try to publish all of the news that would be of interest to the Spanish speaking people and emphasize news concerning the Spanish speaking community and Latin America.

We include in the paper articles on local, state, and national politics. As elections draw near items of this sort become more newsworthy and are therefore emphasized. We provide space for debate between candidates and normally take a position before elections. Candidates may purchase advertising space in the paper. At one time or another, candidates for office at the national, state, and local levels have purchased space, but the bulk of our political advertising is more or less local.

[fol. 57] We have public service columns and, as a public service, have apprised the Spanish speaking people of the procedures and qualifications necessary to register to vote.

We subscribe to the United Press International and the Associated Press news services. The coverage we receive from these services is in both Spanish and English. For

publication in El Diario we translate into Spanish the reports received in English from the news services and any press releases and information from local and state political leaders and office holders.

/s/ A. L. Rosenthal
A. L. ROSENTHAL

Sworn and subscribed to before me this 8th day of October, 1965.

/s/ Lydia Ellorin
LYDIA ELLORIN
Commissioner of Deeds
City of New York 3-263
Certificate filed in Bronx County
Commission Expires May 25/67

[fol. 58] AFFIDAVIT

COUNTY OF NEW YORK)
) ss:
STATE OF NEW YORK)

LUIS ROMANACCE, after first being duly sworn, did depose and say:

My name is LUIS ROMANACCE. I am program director for radio station WADO, whose offices are located at 205 East 42nd Street, New York, New York.

WADO broadcasts entirely in the Spanish language. Its broadcast area covers the entire New York City Metropolitan area, including lower Connecticut and parts of New Jersey. The station broadcasts sixteen hours a day Monday through Friday, nineteen hours a day on Saturday and eleven hours a day on Sunday.

The station broadcasts a five minute news report every hour, a fifteen minute news report several times a day, and spot news when it happens. The station subscribes to the United Press International wire service in both Spanish and English. News reports include items on the international, national and local level. We also broadcast special events and discussion programs on topics of public interest and concern. The Puerto Rican Bar Association, the various city departments, the Board of Education, and the League of Women Voters have contributed material for such programs. Information regarding voter registration and elections is frequently broadcast.

Candidates for public office can and do purchase time for paid political announcements. There is a one-minute time limit on such announcements. Time was purchased [fol. 59] in 1964 by both presidential candidates. Both Senator Javitz and Senator Kennedy have purchased time on WADO. Recent mayoralty candidates Lindsay, Beame, and Screvane all purchased time on the station. All such campaign appeals are in Spanish.

On the basis of surveys and other information that has come to my attention, I estimate that there are approximately 1,400,000 Spanish-speaking people in the New York area. A professional survey conducted in the Summer of 1965 showed that for each quarter hour WADO is on the air, it reaches between 30,000 and 40,000 Spanish-speaking homes.

/s/ Luis Romanacce
LUIS ROMANACCE

Sworn to before me on the 7th day of October, 1965

/s/ Gilbert Feldberg
Notary Public

GILBERT FELDBERG
Notary Public, State of New York
No. 24-6259000
Qualified in Kings County
Term Expires March 30, 1966

[fol. 60] AFFIDAVIT

COUNTY OF NEW YORK)
) SS.:
STATE OF NEW YORK)

RALPH COSTANTINO, after first being duly sworn, did depose and say:

My name is RALPH COSTANTINO. I am program director for radio station WHOM, located at 136 West 52nd Street, Manhattan, New York. I have been in the radio business for 25 years.

WHOM broadcasts entirely in the Spanish language, and covers a broadcast area which includes the metropolitan area of New York City. I would estimate that in this area there are approximately 1,000,000 Spanish speaking people living in 220,000 households.

WHOM broadcasts five minutes of news each hour and bulletins as developed. The station is very news oriented. Each day there is a five minute newscast which emanates from the island of Puerto Rico and two fifteen minute news round-ups. The programming is typical of most radio stations in America except that it is in Spanish. We allow candidates to purchase broadcast time for campaign speeches.

WHOM has public service programs which include a roundtable discussion each Saturday on various subjects. One of these subjects was voting, including how to vote, when and where to vote, and other procedures and qualifications involved in voting. These public service [fol. 61] programs have cooperated with such agencies as the Water Department, the Police Department, the Fire Department, and the Health Department. The station also maintains an orientation center for Spanish speaking people where they can receive help with their problems and other information. As part of this service we have been handing out Board of Election affidavits for the City of New York. During the recent campaign for registration Senator Robert Kennedy spoke over radio WHOM encouraging registration. He was introduced in Spanish but spoke in English. His speech was immediately fol-

lowed by a broadcast of a Spanish translation of his speech.

WHOM subscribes to both the Spanish and the English United Press International wire news services. Coverage includes national, international, and local news. We translate the English reports which we receive from UPI and other sources into Spanish before it is broadcast. For example during the major elections we monitor the television coverage of the returns and rebroadcast these reports in Spanish.

/s/ Ralph Costantino
RALPH COSTANTINO

Sworn and subscribed to before me this 8th day of October, 1965.

/s/ Anthony J. Morelli
ANTHONY J. MORELLI
Notary Public, State of New York
No. 30-3012300
Qualified in Nassau County
Commission Expires March 30, 1966

[fol. 62] AFFIDAVIT

COUNTY OF)
) SS.:
STATE OF NEW YORK)

C. CARROLL LARKIN, after first being duly sworn, did depose and say:

My name is C. CARROLL LARKIN. I am the Manager of Radio Station WBNX whose offices are located at 801 Second Avenue, New York City. WBNX is a division of the United Broadcasting Company which has

Spanish language stations in Washington, D.C. and Miami, Florida. WBNX broadcasts in Spanish 19 hours Monday through Friday, 20 hours on Saturday and 7 hours on Sunday. The Broadcast area of the station includes the entire New York City metropolitan area.

WBNX broadcasts news every half hour, totalling roughly seven minutes of news each hour. We broadcast three 15 minute news programs daily at 7:30 P.M., 10:00 P.M. and 11:00 P.M. Also there is a one hour news, weather, and time program between 5:00 and 6:00 A.M.

The station subscribes to the United Press International Wire Service. This coverage includes national, international, and local news and is received by the station in both Spanish and English. All wire service reports received only in English which we use are translated at the station and broadcast in Spanish. The station also [fol. 63] broadcasts in Spanish public service announcements of items from such agencies as the Police Department, the Fire Department, the Red Cross, the Traffic Department, and the Water Department, among others. With respect to voter registration, we broadcast information regarding qualifications, times and places for voting, and voting procedures.

Candidates for public office frequently purchase time on WBNX for political announcements. Two candidates in the present Mayor's race have purchased time and national and State level candidates have done so in the past. All such announcements are in Spanish.

/s/ C. Carroll Larkin
C. CARROLL LARKIN

Sworn to before me this 8 day of October, 1965

/s/ Gilbert Feldberg
GILBERT FELDBERG
Notary Public, State of New York
No. 24-6259000
Qualified in Kings County
Term Expires March 30, 1966

[fol. 64] AFFIDAVIT

COUNTY OF)
) ss.:
STATE OF NEW YORK)

My name is Herman Badillo. I live at 6495 Broadway, Bronx, New York. I am a qualified attorney and certified public accountant. I was born in Caguas, Puerto Rico on August 21, 1929 and have lived in New York City since 1941. I am presently the Democratic candidate for Bronx Borough President and I participated in the September 1965 Democratic party primary in New York City.

My recently concluded primary campaign was conducted throughout the entire borough of the Bronx. It is my rough estimate that approximately fifteen per cent of the voters in the Borough speak Spanish. I made frequent speeches on a daily basis from August 3, 1965 to September 14, 1965 throughout the Borough, both on the streets and in various clubs. All my campaign speeches in sections of the borough where Spanish is spoken were given in part in Spanish. Approximately thirty thousand post cards in the Spanish language were sent out in support of my candidacy to registered voters in the Bronx. One such post card is attached to this affidavit. None of my campaign posters were in Spanish.

Numerous campaign meetings and rallies were held in my behalf in the Spanish language. The Mayor of the town of my birth, Caguas, Puerto Rico, and the Mayoress of San Juan, Puerto Rico both campaigned for me using Spanish in the Spanish speaking neighborhoods of the Bronx.

I used the Spanish-language newspaper "El Diario" to advertise and publicize my candidacy on a daily basis. I also prepared tape-recorded speeches in Spanish which [fol. 65] were broadcast on three Spanish language radio stations in New York City frequently. Arrangements for

these broadcasts were handled through the campaign headquarters of Mayoralty candidate Paul Screvane.

/s/ Herman Badillo
HERMAN BADILLO

Sworn to before me this 8th day of October, 1965

/s/ Ruth L. MacLaughlin
RUTH L. MACLAUGHLIN
Notary Public, State of New York
No. 31-7656265 Qual. in New York Co.
Certificate filed in New York County
Commission Expires March 30, 1966

[fol. 66] AFFIDAVIT

COUNTY OF)
) SS.:
STATE OF NEW YORK)

JUSTO J. CECILIA, after first being duly sworn, did depose and say:

My name is JUSTO J. CECILIA. I live at 763 Fox Street, Apartment 4-J, Bronx, New York. I am a bookkeeper. My business address is 508 Willis Avenue, Bronx, New York. I was born on February 14, 1933 in Isabela, Puerto Rico. I came to New York City from Puerto Rico in 1960.

I was a republican candidate for the New York State Senate in the General Election of November, 1964, in the then 27th Senatorial District (now the 35th. District). About 35 per cent of the voters in this district speak Spanish.

In 1964 my campaign literature consisted of 5,000 pamphlets, all of which were in Spanish. I also used 2500 campaign posters bearing my photograph. These were all in English. The posters and the pamphlets were distributed by myself and a few assistants. I also used a sound truck at between 40 and 60 unscheduled campaign meetings during the four or five weeks preceding the election. These meetings were held at various places throughout the district and were attended by between 20 and 100 persons. I was the only speaker. All the speeches I made using this sound truck were in Spanish.

[fol. 67] During the campaign one news-type article which included my photograph appeared in "El Diario", a Spanish language news paper.

To the best of my recollection Senator Ivan Warner, one of my opponents in the 1964 election, used Spanish campaign literature and ran advertisements in local Spanish newspapers. Another opponent, Mr. Sanabriana, used a sound truck from which he spoke in Spanish.

I am a member of the Hunts Point Republican Club at 901 Hunts Point Avenue, Bronx, New York. This club is not primarily composed of Spanish-speaking people.

/s/ Justo J. Cecilia
JUSTO J. CECILIA

Sworn to before me this 7th day of October, 1965

/s/ John J. Montes
JOHN J. MONTES
Notary Public, State of New York
No. 08-7995960
Qualified in Bronx County
Commission Expires March 30, 1966

[fol. 68] AFFIDAVIT

COUNTY OF)
)
STATE OF NEW YORK) SS.:

My name is JOSE RAMOS-LOPEZ. I live at 1421 Madison Avenue, New York, New York. I was born on November 2, 1914 at Caguas, Puerto Rico. I am an attorney and my office is at 384 East 149th Street, Bronx, New York. I am a Democrat and represent the 75th Assembly District in the New York State Assembly. I have been a member of the State Assembly since 1959.

In 1964 I represented what was then the 14th Assembly District and which now, with some changes, is the 75th District. I estimate that approximately fifty percent of the voters in the 75th District speak Spanish; a somewhat lower percentage of the voters in the old 14th District spoke Spanish. I have always used the Spanish language in my political campaigns. Whatever campaign literature I have printed is printed in both Spanish and English. In my 1964 primary campaign I distributed roughly 40,000 pieces of literature by mail and hand-delivery and in the 1965 primary about 50,000 pieces. In each case approximately fifty percent of the literature was in Spanish.

In 1964 I attended and conducted numerous campaign meetings which were held in Spanish as well as English. In my 1965 campaign meetings Spanish was used as fre-
[fol. 69] quently as English. As each campaign drew to a close, the meetings were conducted on a daily basis and drew approximately 250 to 300 people each. The meetings normally took place at the New Deal Democratic Club, 1492 Madison Avenue, New York, or at the Caribe Democratic Club, 115 West 116th Street, New York. The Caribe Democratic Club, of which I am an official, was established twelve years ago and is part of the New York County Democratic organization.

As a candidate and as an assemblyman I frequently prepare in Spanish press releases on my positions and activities. The Spanish press, in particular the daily pa-

per "El Diario-La Prenza" often uses this material as a basis for news reports on my campaign and legislative activity. "El Diario" also uses the English language press releases of non-Spanish speaking candidates and office-holders in the same manner after translating them into Spanish.

All of my opponents in my political campaigns used Spanish in their campaigns, as do city-wide and statewide candidates. Governor Rockefeller for one is especially fluent in Spanish and employs it frequently when campaigning in parts of New York where Spanish is spoken. Senator Robert Kennedy just a few days ago read part of a campaign speech in Spanish while appearing at a rally in my district. Other non-Spanish speaking city-wide candidates usually employ Spanish speak- [fol. 70] ing campaign aides to campaign in their behalf in Spanish-speaking neighborhoods.

As a member of the Assembly I am frequently interviewed regarding public questions on Spanish-language radio stations. In 1965 this has occurred approximately eight or ten times. Sometimes these are brief question-and-answer sessions recorded away from the studio. Other times they are more formal. I have spoken on stations WADO, WHOM, WWRL, and WLIB in Spanish. In past years, but not recently, I have made paid sport announcements in Spanish on Spanish-language radio stations.

/s/ Jose Ramos-Lopez
JOSE RAMOS-LOPEZ

Sworn to before me this 7th day of October, 1965

/s/ John J. Montes
JOHN J. MONTES
Notary Public, State of New York
No. 03-7995960
Qualified in Bronx County
Commission Expires March 30, 1966

[fol. 71] AFFIDAVIT

COUNTY OF NEW YORK)
) ss.:
STATE OF NEW YORK)

CARLOS MANUEL RIOS, after first being duly sworn, did depose and say:

My name is CARLOS MANUEL RIOS. I live at 314 East 105th Street, New York, New York. I was born on March 5, 1914 at Ponce, Puerto Rico. My office is at the East Harlem Reform Democratic Club at 1678 Lexington Avenue, New York City.

I am presently a member of the New York State Assembly representing the 10th Assembly District. This district will become part of the 76 District under the current reapportionment. It is my estimate that approximately 40 per cent of the voters in my district speak Spanish. I am now a Democratic candidate for Councilman at-large for New York County in the 1965 general election.

Over all, in the 1964 and in the present campaign, about 50 per cent of my campaigning was and is in Spanish, about half of my campaign speeches are in Spanish and the hand bills and other literature I have had distributed are all in both English and Spanish. In both my 1964 and 1965 campaigns I distributed approximately 25,000 handbills.

I have purchased newspaper advertisements in the Spanish language newspapers "Mundo Americano" and "El Diario-La Prensa". A copy of a full page advertisement I ran in Mundo Americano during my 1965 campaign is appended hereto as Attachment A. I have also purchased time on WHOM and WBNX, two Spanish language radio stations in New York City. The time pur-
[fol. 72] chased was for one minute campaign spot announcements. I know that at least two of my opponents

in the 1965 primary, Mrs. Eugene Flatow and Mr. Gilberto Gerena Valintin, used Spanish campaign literature.

/s/ Carlos Manuel Rios
CARLOS MANUEL RIOS

Sworn to before me this 7th day of October, 1965

/s/ Franklyn Gould
FRANKLYN GOULD
Notary Public
State of N.Y.
Co. of N.Y.
Comm. Ex. Mar. 6, 1966

[fol. 73] AFFIDAVIT

STATE OF TEXAS
COUNTY OF BEXAR

Jake Johnson, of San Antonio, in the County of Bexar, State of Texas, being duly sworn, deposes and says:

1. That he is a Member of the Texas House of Representatives from Bexar County.
2. That he is presently serving his third term of office, having campaigned seven times throughout the County of Bexar, in four party primaries and in three general elections.
3. That he has run at large in Bexar County and is familiar with the conduct of the political campaigns of other office holders and seekers in the County and State.
4. That he has lived in San Antonio for 14 years and he is a native born American of English speaking descent.
5. That approximately 50% of the persons living in Bexar County are Spanish speaking, many of whom are unable to read or speak the English language.
6. That the following techniques and practices are employed by political office seekers to communicate with non-English speaking voters:

a. Voting machines are exhibited and demonstrated on the Spanish speaking television stations where the

viewers are shown how to operate the machines. They are shown how to vote a straight one-party ticket or how to split a ticket. Such matters as how to close the voting booth curtain and recognize various political candidates' names are also demonstrated.

b. Spanish speaking radio and television are used to explain the issues and to see and hear the candidates.

[fol. 74] c. State-wide office seekers inform the Spanish speaking voters of their positions and qualifications through local office holders and interested persons who are articulate in the Spanish language.

d. Speeches made at public gatherings are often in Spanish when the audience is primarily Spanish speaking.

e. Leaflets are distributed with the names of the candidates and the party symbols, donkey or elephant, beside the names.

7. That the inability to read or speak English is not a barrier to intelligent voting for candidates or issues. Candidates who don't speak Spanish, solicit persons who speak Spanish to campaign for them in the Spanish speaking communities.

8. In the Texas House of Representatives there are 150 Members of whom approximately 40 have substantial Spanish speaking constituencies. They all campain in Spanish themselves or employ others to do so in their behalf.

/s/ Jake Johnson
Rep. Dist. 68, Texas House

Subscribed and sworn to before me, this 5th day of October, 1965.

My Commission expires June 1, 1967.

/s/ Robert L. Vale
ROBERT L. VALE
Notary Public in and
For Bexar County, Texas

[fol. 75] AFFIDAVIT

STATE OF TEXAS
COUNTY OF BEXAR

John C. Alaniz, of San Antonio, in the County of Bexar, State of Texas, being duly sworn, deposes and says:

1. That he is a Member of the Texas House of Representatives from Bexar County.

2. That he is presently serving his third term, having campaigned six times throughout the County of Bexar, in three party primaries and in three general elections.

3. That he has run at large in Bexar County and is familiar with the political campaigns of other political office holders and seekers in the County and State.

4. That he has lived in San Antonio for 30 years and he is a native born American of Mexican descent.

5. That 50-55% of the persons residing in Bexar County are Mexican Americans, many of whom are unable to speak, read, or understand the English language clearly.

6. That the following techniques and devices are employed by political office seekers to communicate with non-English speaking persons in an effort to inform them as to the issues and candidates:

a. Speeches are delivered in English and Spanish depending upon the linguistic character of the particular audience.

b. The use of radio and television is employed. There are four Spanish speaking radio stations and seven English speaking stations; one Spanish speaking television station and three English speaking television stations. Both English and Spanish speaking stations are used to reach all members of the voting public regardless of linguistic ability.

[fol. 76] c. Leaflets are printed and distributed by interested persons in both Spanish and English, explaining the issues to be voted upon and the candidates running for office.

d. State-wide office seekers utilize local political office seekers, and other interested persons to campaign in the Spanish speaking communities in an effort to get their (state-wide candidates) message across to the non-English speaking voters.

7. That election judges in precincts give oral instructions in Spanish to persons who are unable to read or speak English. This practice is authorized by V.A.T.S. Election Code, Art. 8.13a.

8. That many members of the Texas House of Representatives have a substantial number of Spanish speaking persons in their districts and to my knowledge they all campaign partly in Spanish.

/s/ John C. Alainz—Dist. 68-7

Subscribed and sworn to before me, this 5th day of October, 1965.

My Commission expires June 1, 1967.

/s/ Robert L. Vale
ROBERT L. VALE
Notary Public in and
For Bexar County, Texas

[fol. 77] AFFIDAVIT

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

Edwin E. Willis, being first duly sworn, says:

My name is Edwin E. Willis. I am a member of the United States House of Representatives and have represented the Third Congressional District of Louisiana since

January of 1949. Before that I served a year as a member of the Louisiana State Senate.

I have no personal interest in the litigation concerning the constitutionality of Section 4(e) of the Voting Rights Act of 1965 inasmuch as that section has no application to my District or State.

I was born in Arnaudville, Louisiana, on October 2, 1903, and lived there until 1920, when I moved to St. Martinville, Louisiana. I moved to New Orleans in 1922 and returned to St. Martinville in 1936, where I have lived ever since.

I have been involved in Louisiana party politics in my area, in one way or another, for over thirty years. The congressional district that I represent has a population of some 400,000. Most of these people are of French background and well over 50 per cent of those of French background speak or understand the French language. Of those who speak or understand French there is a minority, quite small but important to me as a candidate and as an individual, that cannot understand or speak English.

[fol. 78] Every election year I have campaigned in my district, not only for myself, but frequently for other candidates for national, state, and local office. I have always done some of my campaigning in French. I believe that a candidate for office in my area who does not use French would be handicapped in his effort to reach all of the voters.

I keep as close contact as I can with the voters in my district. I visit with them frequently and talk to them, both individually and in groups. It is not uncommon for them to ask me questions and discuss their problems with me in French. Many times I know that the voter I am talking to cannot read and write in English, and is even unable to understand spoken English. We often discuss political issues and candidates in this manner. From my years of experience in campaigning among French-speaking people, I have formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language.

Louisiana law permits a prospective voter to establish his literacy in his mother tongue if his mother tongue is other than English. There have been no problems arising from the administration of this law that I am aware of. In my judgment the limitation of the electorate solely to persons who are literate in the English language would [fol. 79] not result in a better informed or more intelligent electorate.

/s/ E. E. Willis

Subscribed and sworn to before me this 12th day of October, 1965.

/s/ H. Eldred Wilson
Notary Public
H. ELDRED WILSON
Notary Public, District of Columbia
Commission Expires Sept. 15, 1969

[fol. 80] AFFIDAVIT

STATE OF NEW MEXICO)
: ss.
COUNTY OF SANTA FE)

I, BOSTON E. WITT, after first having been duly sworn, state: that my name is Boston E. Witt, that I am the duly elected and qualified Attorney General for the State of New Mexico, and that I have served in that capacity since January 1, 1965. I was elected to that office on November 3, 1964. Prior to that time I served as Deputy Attorney General and as Assistant Attorney General since 1959.

I am a native New Mexican and a life-long resident, having been born and raised in New Mexico.

I have been involved in New Mexico party politics in one way or another for the last ten years. The State of

New Mexico has a population of approximately 1,031,900 people. I would judge that better than 27 percent of these people are Spanish-speaking and a substantial number of them are illiterate in English.

Every election year I have campaigned in New Mexico, not only for myself but for other candidates for national, state and local offices, I have always done some of my campaigning in Spanish and Tewa Indian because of our three cultures in New Mexico. I believe that a candidate for office in New Mexico has to use at least English and Spanish in order to effectively reach all of the voters. While campaigning, I have traveled throughout the State of New Mexico making speeches and talking to citizens of the State in connection with my campaign. I have also advertised my campaign by appearing on television and radio and speaking the Spanish language. Many of my radio tapes were cut in English, Spanish and Tewa Indian. Many of my billboards were in Spanish.

[fol. 81] I visit with the electorate frequently and talk to them individually, in small groups and in large groups. It is common for them to ask me questions and to discuss their problems with me in Spanish. Many times I know that the voter I am talking to cannot read and write in English and is not able to understand spoken English. We often discuss political issues and candidates in Spanish. From my years of experience in campaigning and being involved in New Mexico politics among Spanish-speaking people, I have formed a definite opinion that Spanish-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates as do people who read and write the English language.

New Mexico law permits a prospective voter to register and to vote in the Spanish language. In addition, New Mexico law requires the instructions on voting machines and ballots, and certain election notices, to be written and published in both Spanish and English. These laws have, in my opinion, worked well. There have been few, if any, problems arising from their administration of which I am aware. In my judgment, the limitation of the electorate solely to persons who are literate in the English language would not result in a better informed or more in-

telligent electorate, nor would it be in the best interest of New Mexico.

Effective compaigning in New Mexico at the precinct level requires that some speeches be made in Spanish. Advertising at this level in Spanish is important also, particularly in those areas of New Mexico where the Spanish-speaking people predominate.

Signed this 11th day of October, 1965.

/s/ Boston E. Witt
BOSTON E. WITT
Attorney General
State of New Mexico

Subscribed and sworn to before me this 11th day of October, 1965.

/s/ Emilie Barrone Ortiz
Notary Public

My Commission expires:
4-4-69

[fol. 82]

PUERTO RICANS IN THE UNITED STATES [1]

STATE	NO.	STATE	NO.
Alabama *	663	Mississippi	301
Alaska *	562	Missouri	940
Arizona *	1008	Montana	53
Arkansas	207	Nebraska	333
California *	28,108	Nevada	179
Colorado	844	New Hampshire	212
Connecticut *	15,247	New Jersey	55,351
Delaware *	773	New Mexico	433
District of Columbia	1373	New York *	642,622
Florida	19,535	North Carolina	1866
Georgia *	2334	North Dakota	68
Hawaii *	4289	Ohio	13,940
Idaho	60	Oklahoma	1398
Illinois	36,081	Oregon *	233
Indiana	7218	Pennsylvania	21,206
Iowa	226	Rhode Island	447
Kansas	1136	South Carolina	1114
Kentucky	1376	South Dakota	124
Louisiana	1935	Tennessee	499
Maine *	403	Texas	6050
Maryland	3229	Utah	473
Massachusetts *	5217	Vermont	108
Michigan	3806	Virginia	2971
Minnesota	387	Washington *	1738

[fol. 83]

STATE	NO.
West Virginia	252
Wisconsin	3574
Wyoming	50

[1] United States Census of Population, 1960. Subject Reports, *Puerto Ricans in the United States*, p. 103.

* English language literacy requirement.

[fol. 84]

Puerto Rican Migration to Continental U.S.[1]

ANNUAL AVERAGES

1909-1930	1,986
1931-1940	904
1941-1950	18,794
1951-1960	41,212
1961-1962	4,523

EACH YEAR, 1950-1960

1950	34,703
1951	52,899
1952	59,103
1953	69,124
1954	21,531
1955	45,464
1956	52,315
1957	37,704
1958	27,690
1959	29,989
1960	16,298

[1]Migration Division Puerto Rico Department of Labor, *A Summary in Facts and Figures, Puerto Rican Migration to New York City* (New York, 1964) p. 10

[fol. 85]

EDUCATION STATISTICS FOR PUERTO RICO

School Enrollment [1]

Population 5 to 34 years old	Students Enrolled in Schools 5 to 34 years old	% of Students Enrolled in Schools—5 to 34 years old
1,330,660	606,436	46%

SCHOOLS 1961-62 [2]

Public	Private
Elementary—1694	*Elementary*—126 (112—Church Related)
High Schools—443	*High Schools*—87

[1] United States Census of Population 1960, *Puerto Rico; General Social and Economic Characteristics*, Table 39 p. 53-119

[2] *STATISTICS OF STATE SCHOOLS SYSTEMS, 1963-64* OFFICE OF EDUCATION, DATA FROM DEPARTMENT OF EDUCATION OF PUERTO RICO TO THE UNITED STATES OFFICE OF EDUCATION.

[fol. 86]

Years of School Completed

Population 14 Years Old or More [1]	Number Completing 8th Grade 14 Years Old or More [1]	% Completing 8th Grade 14 Years Old or More
1,406,444	485,004	34%

[1] U. S. Census of Pop. 1960 *Puerto Rico: Detailed Characteristics* Table 80.

[fol. 87]

Population and Education Statistics for Puerto Ricans in States with Population of 25,000 or More [1]

State	Puerto Ricans in State	Puerto Ricans by Birth	Birth & Parentage Puerto Ricans 1960 20 yrs. and older	% Puerto Ricans who are 14 yrs. & older with 7th gr. education
California	28,108	15,479	16,278	70%
Illinois	36,081	25,843	17,623	56%
New Jersey	55,351	39,779	28,295	56%
New York	642,622	448,585	344,836	60%

[1] UNITED STATES CENSUS OF POPULATION, 1960. *PUERTO RICANS IN THE UNITED STATES* Table 6.

[fol. 88]

LITERACY IN PUERTO RICO, 1960 [1]

Ability to Read and Write Any Language

Total Population	Able to read and write		Unable to read and write		Not reported
	Number	Percent	Number	Percent	
1,670,084	1,386,968	83.0	276,876	16.6	6,240

Ability to Speak English

Able to speak English		Unable to speak English		Not reported
Number	Percent	Number	Percent	
629,280	37.7	1,024,824	61.4	15,980

[1] United States Census of Population 1960, *Puerto Rico*, p. 53-121.

[fol. 89] AMERICAN FLAG SCHOOLS

Guam

Citizenship: 8 U.S.C.A. § 1407
Population 1960: 67,044[1]
Education:

a. Those 14 and over who have completed 7th grade—17,228[2]

b. Enrolled in school—17,840[3]

c. Language of instructions—English 3 Territory of Guam Code § 11200 (1960)[4]

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[1] United States Census of Population 1960, *Guam, General Population Characteristics.* Table 4, p. 54-8.

[2] United States Census of Population 1960, *Guam, General Population Characteristics.* Table 11, p. 54-12.

[3] United States Census of Population 1960, *Guam, General Population Characteristics.* Table 7, p. 54-10.

[4] This regulation was enacted in the first code in 1952. There is a second language but such is only spoken so one could not be literate in it.

[fol. 90] *Canal Zone*

Citizenship (Parent a citizen): 8 U.S.C.A. § 1403
Population 1960: 42,122 [1]
Education:

a. Those 14 and over who have completed 7th grade—15,245 [2]

b. Enrollment 1962-63 [3]

1. English language schools—10,300

2. Spanish language (Latin schools)—3,664 [4]

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[1] United States Census of population 1960, *Canal Zone, General Population Characteristics*. Table 5, p. 57-9.

[2] United States Census of Population 1960, *Canal Zone, General Population Characteristics*. Table 12, p. 57-16.

[3] 1964 Annual Report of the Panama Canal Company and the Canal Zone Government, p. 119.

[4] All of those in Spanish language (Latin schools) are aliens. 1964 Annual Report of the Panama Canal Company and the Canal Zone Government.

[fol. 91] *Virgin Islands*

Citizenship: 8 U.S.C.A. § 1406
Population 1960: 32,099[1]
Education:

a. Those 14 and over who have completed 7th grade—6,039[2]

b. Enrolled in school—8,892[3]

c. Language of Instruction—English

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[1] United States Census of Population 1960, *Virgin Islands of the United States, General Population Characteristics.* Table 5, p. 55-19.

[2] United States Census of Population 1960, *Virgin Islands of the United States, General Population Characteristics.* Table 13, p. 55-19.

[3] United States Census of Population 1960, *Virgin Islands of the United States, General Population Characteristics.* Table 8, p. 55-15

[fol. 92]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

JOHN P. MORGAN and CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS DEB. KATZENBACH, as Attorney General of the United States, and NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, DEFENDANTS

Alfred Avins, of Washington, D. C. for the plaintiffs.

St. John Barrett and David Rubin of the Department of Justice, for the defendant Katzenbach, and for Intervener United States of America.

Leo A. Larkin, Corporation Counsel of the City of New York, and Morris Einhorn, Assistant Corporation Counsel, both of New York, N. Y., for the defendants James M. Power et al.

Louis F. Lefkowitz, Attorney General of the State of New York, Ruth Kessler Tock, Assistant Solicitor General, and Jean M. Coon, Assistant Attorney General, all of Albany, N. Y., filed a brief as *amici curiae* in support of plaintiffs' position.

[fol. 93] Before McGOWAN, Circuit Judge, HOLTZOFF, District Judge, and McGARRAGHY, District Judge.

OPINION—NOVEMBER 15, 1965

HOLTZOFF, District Judge. The question presented in this case is whether the Congress has constitutional power to regulate by statute the qualifications of voters and to supersede the requirements prescribed by the States. Specifically the issue is the constitutionality of Section

4(e) of the Voting Rights Act of 1965, which in effect provides that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting under any literacy test. As a corollary, the ultimate problem is whether this provision of the Act of Congress supersedes the literacy test for voters prescribed by the constitution and statutes of the State of New York, which impose the ability to read and write English as a requirement for voting.

[fol. 94] The action is brought by voters in the City of New York, who claim that the weight of their votes is being adversely affected by the fact that numerous citizens living in New York City, who have migrated from Puerto Rico and who read and write only in the Spanish language, are being permitted by the local authorities to vote in disregard of the State literacy test and in compliance with the Act of Congress, which the plaintiffs claim is unconstitutional when it conflicts with State law. The defendants are the Attorney General of the United States and the members of the Board of Elections of the City of New York. The plaintiffs seek a declaratory judgment and an injunction restraining compliance with the Act of Congress. In view of the fact that this action is brought to enjoin the enforcement of an Act of Congress on the ground of its repugnance to the Constitution of the United States, a statutory three-judge court was convened, 28 U.S.C. §§ 2282 and 2284. The United States has been permitted to intervene in support of the validity of the Act of Congress, 28 U.S.C. § 2403, and Rule 24(a) of the Federal Rules of Civil Procedure. The Attorney General of the State of New York has filed a brief as *amicum curiae* in support of the plaintiffs' contention.

The plaintiffs clearly have a standing to sue. A voter who claims that the weight of his vote is being diluted or impaired by the ballots of others who are not legally entitled to vote, has a right to challenge their right of suffrage and to bring appropriate proceedings to prevent [fol. 95] their votes from being cast or counted.[1]

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[1] *Gray* v. *Sanders*, 372 U. S. 368, 374-5.

The Voting Rights Act of 1965 (Act of August 6, 1965, Public Law 89-110, U. S. Code Congressional and Administrative News, pp. 2326 *et seq.*) Section 14(b), provides as follows:

> (b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

This provision confers on this Court exclusive jurisdiction of this action. In fact the Attorney General of the United States concedes that this Court has jurisdiction, although the Corporation Counsel of the City of New York contests it. We conclude that jurisdiction exists.[2] The matter is before the Court on cross-motions for summary judgment.

The Constitution of the State of New York, Article II, Section 1, which defines the qualifications of voters, provides, in part, as follows:

> Notwithstanding the foregoing provision, after January first, one thousant nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such [fol. 96] person is also able, except for physical disability, to read and write English.

This requirement is reiterated in Section 150 of the Election Laws of the State of New York,[3] the pertinent provision of which reads as follows:

> In the case of a person who became entitled to vote in this state by attaining majority, by naturalization

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[2] Cf. *McCann* v. *Paris* (W.D.-Va. 1965) 244 F. Supp. 870, dismissing for lack of jurisdiction an action challeng- the validity of another provision of the Voting Rights Act, and holding that this court alone has jurisdiction of the subject matter.

[3] McKinney's Consolidated Laws of New York, Book 17, p. 327.

or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English.

It appears from the papers annexed to the motions before the Court and it is undisputed that beginning in about 1940 there was a large migration to New York City of citizens of the United States from Puerto Rico, and that there are several hundred thousand such persons now living in New York. About half of them are unable to read or speak English, but many of them are able to read and write Spanish, because the public schools of Puerto Rico are conducted largely in that language. Thus there is a large group of American citizens residing in New York who are disqualified from voting because of the New York literacy test. It is reasonable to assume that undoubtedly there are other citizens who are also unable to meet the literacy test and are likewise disqualified from voting.

The Voting Rights Act of 1965, which was enacted by Congress and became law on August 6, 1965, as heretofore stated, contains the following provision in Section 4(e):

[fol. 97] (e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the

English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, and State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

If the foregoing Congressional provision is valid, it *pro tanto* nullifies the constitutional and statutory provisions of New York state, which impose an English literacy test on voters. It would require New York not to apply the literacy requirement exacted by its constitution and laws to voters who have been educated in a public school, or accredited private school, in any State, territory, District of Columbia, or the Commonwealth of Puerto Rico, in which the predominant language was other than English. The constitutional and statutory enactments of the State of New York would be abrogated and nullified to that extent.

It is urged by the plaintiffs that the Congressional enactment is invalid and unconstitutional. The Voting [fol. 98] Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. Potent machinery is credited by the statute to achieve this end. Section 4(e) is, however, completely and entirely disassociated from the rest of the Act and constitutes no part of the scheme of the legislation. The measure originated in the Senate. Section 4(e) was not in the bill as reported by the Senate Committee on the Judiciary. It was inserted by an amendment from the floor. After the bill passed the Senate, the House of Representatives struck out the entire bill except the enacting clause and substituted a different measure, which again did not include any such provision. Section 4(e) was, however, reinserted by the Conference Committee and remained in the measure as finally passed. It is quite apparent that the Section did not receive consideration by any legislative Committee in either House. While Section 4(e) was directed at the Puerto Rican situation in New

York, which has already been briefly described, actually it is much broader in its phraseology and scope and conceivably may be applicable to many other citizens who are illiterate in English, and is effective throughout the United States.

Traditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate. Thus Article I, Section 2, of the Constitution of the United States, provides as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People [fol. 99] of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

It will be observed that this Section does not include the power to prescribe requisites for the right of suffrage. Power to make or alter regulations concerning "the times, places and manner of holding elections" does not comprise authority to regulate qualifications for voters. No express or implied power is conferred by the Constitution on Congress to legislate concerning requirements for voters in the several States. The matter is within the purview of the Tenth Amendment, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

The right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right con-

ferred by the States. In *Minor* v. *Happersett*, 21 Wall. 162, 177, Mr. Chief Justice Waite, in speaking for a unanimous bench, stated:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States con-
> [fol. 100] fessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

In that case it was held that the States had the power of excluding women from the right to vote. It required a Constitutional amendment to grant suffrage to women.

In *Pope* v. *Williams*, 193 U. S. 621, 632, the same theory was again enunciated:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* (Emphasis supplied.)

The doctrine that the right to vote is not a privilege derived from the United States, but is conferred by the State, was reiterated in *Breedlove* v. *Suttles*, 302 U. S. 277, 283, in the following manner:

> Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.* (Emphasis supplied.)

In that case the Supreme Court unanimously held that the States had power to impose a poll tax as a prerequisite for voting. It required a Constitutional Amendment to [fol. 101] eliminate the exaction of poll taxes as a condition precedent to voting in Federal elections.

Only within the past year the Supreme Court again restated the same propositions in *Carrington* v. *Rash*, 380 U. S. 89, 91, as follows:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams*, 193 U. S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northhampton Election Bd.* 360 U.S. 45, 50. Compare *United States* v. *Classic*, 313 U. S. 299; *Ex parte Yarbrough*, 110 U. S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams*, *supra*, at 632.

This case will be hereafter discussed in another connection.

The case of *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, decided in 1959, is practically on all fours with the case at bar. The State of North Carolina prescribed a literacy test for voters in the English language. A voter brought suit in the Federal court for a declaration that the requirement was unconstitutional. The Supreme Court unanimously upheld the validity of the test and the power of the State to impose it. In its opinion, which was written by Mr. Justice Douglas, the Court discussed the authority of the States *vis-a-vis* the power of the Congress in this field, in the following illumi- [fol. 102] nating manner, p. 50:

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. Article 1, § 2 of the Constitution in its provision for the election of Members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People". Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature". So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. While §2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of "the right to vote", the right protected "refers to the right to vote as established by the laws and constitution of the State". *McPherson* v. *Blacker*, 146 U. S. 1, 39.

There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude:—

[fol. 103] Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the

> United States or by any State on account of race, color, or previous condition of servitude.

By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. That Amendment reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The latest Constitutional Amendment in this field is the Twenty-fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. That Amendment reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evidence, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative [fol. 104] enactment. If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage.

In *Minor* v. *Happersett*, 21 Wall. 162, 175, to which reference has already been made, Mr. Chief Justice Waite adverted and commented on this point as follows:

> And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

There is indeed an inherent limitation on the States implicit in the Equal Protection of the Laws clause of the Fourteenth Amendment. The States are barred from making an unreasonable classification between various groups of citizens in determining who should have the right to vote. Thus, in *Carrington* v. *Rash*, 380 U. S. 89, *supra*, it was held that while a State may impose reasonable residence requirements for voting, it may not deny the ballot to a *bona fide* resident merely because he is a [fol. 105] member of the armed forces of the United States. In other words, the State is precluded from distinguishing between residents who are civilians and residents who are members of the armed services, on the ground that such a distinction is an unreasonable classification and discrimination in violation of the Equal Protection of the Laws clause.

This rule is inapplicable in the instant case, because in *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, from which we have already extensively quoted, it was held that a distinction between citizens who can read and write English and those who cannot, is not an unreasonable classification and does not violate the Equal Protection of the Laws clause. Moreover, what is involved in the case at bar is not the constitutionality of the New York State literacy test. Its validity is not assailed. What

is presented here is the constitutionality of the Congressional enactment which would, in part, abrogate the laws of the State.[4]

A veiled intimation that the New York literacy test was intended to exclude Spanish-speaking citizens from the franchise is both irrelevant in law and untenable in fact. The requirement was originally adopted in 1921—long before the large influx of Puerto Ricans into New York.

At the oral hearing in this case, the argument was advanced that the statutory provision here in question may be sustained as an exercise of the power of Congress to [fol. 106] legislate for the territories under Article IV, Section 3, Paragraph 2, of the Constitution, which authorizes the Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." It is contended that since Section 4(e) relates to citizens of the United States who had been residents of Puerto Rico, therefore the power of Congress to legislate for the Goevrnment of Puerto Rico embraces the authority to enact this provision. There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited nor directed solely to Puerto Ricans and, therefore cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved. No persuasive authority is cited in support of the contention of Government counsel on this point.

We have given due consideration to the presumption of validity which attaches to every Act of Congress. That presumption, however, is completely overcome and de-

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[4] The New York courts have sustained the validity of the literacy test. *Camacho* v. *Doe*, 7 N.Y.2d 763, 194 N.Y. Supp. 2d 33, affirming 21 N.Y. Supp. 2d 262.

stroyed by the inescapable conclusion that we have reached from the foregoing discussion to the effect that Section 4(e) of the Voting Rights Act of 1965, transgresses the powers granted to Congress and, therefore, is repugnant to the Constitution and invalid.

[fol. 107] Much of the oral argument and of the written material submitted in behalf of the Government, is intended to demonstrate what is claimed to be the unfairness of excluding from the right to vote in New York, those Puerto Ricans who can read and write Spanish, but are not literate in English. No matter how weighty and cogent such an argument may be, and we express no opinion on this subject, it should be addressed to the Legislature of New York tSate, rather than to the courts. It is hardly necessary to say that expediency, desirability, and policy of legislation are not the concern of the judiciary. We pass alone on the power to enact the legislation. If any remedy is necessary or desirable, an amendment to the Constitution of the State of New York, possibly implemented by legislation, would seem to be the appropriate recourse and not Congressional legislation.

We conclude that Section 4(e) of the Voting Rights Act of 1965 is unconstitutional. Accordingly, the plaintiffs' motion for summary judgment is granted, and the defendants' cross-motions for summary judgment are denied. Counsel may submit an appropriate order.

McGarraghy, District Judge, concurs.

/s/ A'exander Holtzoff
United States District Judge.

/s/ Joseph C. McGarraghy
United States District Judge.

November 15, 1965.

[fol. 108]

MORGAN v. KATZENBACH
Civil Action No. 1915-65

McGOWAN, *Circuit Judge, dissenting*: With all respect, I do not join in the disposition made by my colleagues of this challenge to Section 4(e) of the Voting Rights Act of 1965. Theirs is a persuasive statement of the difficulties which attend upon Congressional assertion of a power which has not been expressly granted to the federal legislature in the Constitution, and which may, therefore, be thought to have been reserved to the states by the Tenth Amendment. The prescription of voter qualifications is arguably such a power. But those difficulties do not obtain where a foundation for the Congressional action can be found in a power which has explicitly been reposed in the legislative branch of the federal establishment and the emanations of which speak to the states in the compelling accents of the Supremacy Clause.

I think, unlike my brethren, that a foundation of this kind is discernible for Section 4(e) as against the precise and limited attack made upon it in this record. That foundation resides, as a minimum, in the grant by the Framers to Congress of power to "make all needful Rules and Regulations" in respect of the territories.[1] The ma-

[1] *U. S. Const.* art. IV, § 3. Puerto Rico came under American rule by virtue of the Treaty of Paris of 1899, ending the Spanish-American War. That treaty provided, among other things, that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by Congress." 30 Stat. 1754, at 1759. Section 4(e) could, thus, perhaps be regarded as legislation in furtherance of a valid treaty, finding its ultimate authority in the Treaty Power. Art. II, § 2. The New York City Board of Elections has pressed upon us quite strongly another international engagement of the United States in the form of the United Nations Charter. 59 Stat. 1045. Article 55 of the Charter commits the organization to the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; and the individual signatories are bound to seek to achieve these purposes. I do not think it necessary to base Section 4(e) upon these treaties. They are suggestive of the climate in which Congress presumably approaches its responsibilities under its Art. IV, § 3, powers.

[fol. 109] jority say that Section 4(e) cannot be appraised by reference to this grant because it is in terms "neither limited or directed solely to Puerto Ricans." But the complaint which plaintiffs make about Section 4(e) is confined to allegedly illegal voting by Puerto Ricans; and it seems to me that we are not only authorized, but indeed required under sound principles of constitutional adjudication, to restrict our consideration of the validity of this statute to the particular application of it which, so the plaintiffs themselves tell us, brings them into court.

Thus it is that I do not purport to decide anything about Section 4(e) except in respect of our Puerto Rican citizens resident in New York. As to them, however, I think that Congress has an independent base of legislative power which, wholly apart from the Fourteenth and Fifteenth Amendments, enables Congress to regulate rights of suffrage even in the face of adverse state action. This proposition can perhaps best be both explained and tested by a hypothetical case. Let us suppose that, in these troubled times of 1965, it was determined to be in our national interest for a non-English-speaking country to come into our possession in the status of a territory. Wholly aside from such treaty obligations as we might assume in connection with that accession, it seems evident that we might wish to deal with its inhabitants in a way which would commend itself to our own sense of justice and the fitness of things, as well as to the eyes of a world which has become increasingly sensitive about such matters. Congress, with these considerations in mind, adopts a statute which (1) confers extensive rights of self-government upon the territory, including arrangements which admit of the perpetuation of its cultural heritage through the continued use of the native language in the conduct of the public schools, (2) endows the inhabitants [fol. 110] with full American citizenship, including the free right to enter the United States and to take up residence here, and (3) provides that any such person exercising this last-mentioned right shall be privileged to vote in all elections in the state of his residence if his educational attainments are the equivalent of those required of his fellow-citizens, except that they issue in literacy in his native language rather than in English.

I should suppose that there would be little doubt of the power of Congress to enact such a law as a part of its constitutional authority and responsibility for the governance of the territories. And, being an appropriate exercise of an express grant of federal legislative power, it would, under the Supremacy Clause, prevail over any state enactment in conflict with it. I take the Congressional power to make rules and regulations for the territories to comprehend laws relating to the status and rights of the people who inhabit those territories and prescribing that such status and rights are to be recognized throughout the United States as well as in the territory itself. This must be so, if the central purposes of such federal legislation as is hypothesized above are to be realized. To the extent that, as the majority suggest, this may perhaps operate to place citizens of differing national origins in differing positions *vis-a-vis* the right to vote, the answer is that citizens within the reach of the constitutional grant of power over the territories are inescapably and legitimately separated by that fact from citizens to whom it has never extended. And it is appropriate to reiterate that we are not called upon by this record to define the scope of Congressional power with respect to any of our citizens other than Puerto Ricans.

[fol. 111] If, then, it be assumed that Congress could validly enact today a bill of the kind supposed, how closely could it be analogized in substance to what Congress has done over the years in the case of Puerto Rico? The parallel is, in my view, plain.

The controversies rampant at the time about the acquisition of Puerto Rico need not be raked over again. What did emerge from them on the part of most Americans was a unanimity of belief that, once acquired, Puerto Rico should be governed with due regard for the sensitivities of its people as well as world opinion. It was our national purpose to demonstrate, not least to our uneasy selves, that we had not been motivated by the narrow purposes of colonial conquest. There was a swelling impulse to set Puerto Rico on a path leading to a viable independence as speedily as that could be achieved, and an independence which, when it came, would carry with it a

true option to preserve and extend a cultural tradition as venerable as our own. It was as if the goals we envisaged for Puerto Rico were as much tests of ourselves, undertaken in the searching glare of colonialist scepticism, as of the Puerto Ricans.

The response of Congress to these sentiments was immediate and sustained, establishing a tradition of enlightened treatment of Puerto Rico which is currently one of the firmest props of our pretensions to a respectful hearing in the councils of the world. Section 4(e) of the Voting Rights Act of 1965 is but the latest legislative act in this tradition. It was preceded by a series of Congressional efforts to advance Puerto Rico to a self-governing independence. The first was the Foraker Act in 1900, 31 Stat. 77, which left only the lower house of the territorial legislature and the Resident Commissioner to [fol. 112] the United States to popular election by the Puerto Ricans. In the Jones Act of 1917, 39 Stat. 951, Congress brought the upper house under the same selection process, and gave the Governor of Puerto Rico, then subject to appointment by the President of the United States, the right to appoint four of the six Cabinet members. In 1947, the Jones Act was further liberalized, 61 Stat. 770, by empowering the people of Puerto Rico to elect their own Governor, with the latter privileged to select all of his own Cabinet members.

These forward-looking measures were capped in 1950 by the law which authorized the Puerto Ricans to write their own organic law. 64 Stat. 319. The Senate Committee on Interior and Insular Affairs, reporting favorably on this proposal, said:

> This measure is designed to complete the full measure of local self-government in the island by enabling the 2¼ million American citizens there to express their will and to create their own territorial government. . . .
>
> Thus, in the only Latin-American area under the American flag, which is a focal point of inter-American relations, the present measure would give further concrete expression to our fundamental principles of government of, by, and for the people. It is

a logical step in the process of political freedom and economic development that was begun even in the days of our military occupation of the island at the end of the last century.[2]

[fol. 113] When the Puerto Ricans availed themselves of the privilege afforded by this law and proceeded to adopt a Constitution, our own government acted to notify the United Nations that Puerto Rico was no longer a "non-self-governing nation" within the meaning of Article 73 (e) of the Charter. Our official communication in this regard characterized the situation as follows (28 Dept. State Bulletin 587):

> By the various actions taken by the Congress and the people of PuertoRico, Congress has agreed that PuertoRico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.

The Constitution of Puerto Rico, which so came into being in 1952, described its relationship with the United

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[2] S. REP. 1779, 81st CONG., 2d Sess. The Committee took cognizance of an earlier communication to it on behalf of the Secretary of State which said:

> It is believed that, with their own constiution, the high degree of internal self-government which the Puerto Ricans today enjoy in their voluntary association with the United States, will assume for them an added significance. Moreover, such action by our government would be in keeping with the democratic principles of the United States and with our obligations under the Charter of the United Nations to take due account of the political aspirations of the people in our Territories and to develop self-government in them.
>
> In view of the importance of 'colonialism' and 'imperialism' in anti-American propaganda, the Department of State feels that S. 3336 would have great value as a symbol of the basic freedom enjoyed by Puerto Rico, within the larger framework of the United States of America.

States as in the nature of a "union." United States citizenship and freedom of movement, which are ordinarily associated with true political union, had long before been accorded to Puerto Ricans by Congress. The Jones Act in 1917 gave American citizenship to all Puerto Ricans, and permitted them free entry into this country. The Supreme Court once had occasion to characterize these provisions of the Jones Act as embodying a purpose to place PuertoRicans "on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United [fol. 114] States proper and there without naturalization to enjoy all political and other rights." *Balzac* v. *Porto Rico*, 258 U.S. 298, 311 (1922).

The circumstance that Spanish has for many years been the language in which public school proceedings have been carried on is a closely-related consequence of Puerto Rico's steady march, under the Congressional aegis, towards self-government. Although Congress has never expressly directed that Spanish shall be the language of instruction, it has knowingly created and financed educational machinery which has encompassed that result. In the early years of American rule, English was employed in the public schools.[3] This caused many difficulties and local sentiment against it was strong, both for sentimental reasons and considerations of educational efficiency. Beginning in 1916, Spanish was used in the first four elementary grades, and in 1934 this was extended through the eighth grade. With the 1947 amendments to the Jones Act, the Commissioner of Education was appointed by the popularly elected Governor, and the use of Spanish was promptly extended to all grades. This has continued

[3] Under the Foraker and Jones Laws—the so-called Organic Acts—Congress vested authority over the Puerto Rican public schools in an Island Commissioner of Education. This official was a Presidential appointee from 1900 to 1947. His initial policy was to use Spanish in the first eight grades, and English in all others. This went on from 1900 to 1905, at which time English was used in all grades.

to be true since 1952 under the Puerto Rican Constitution.[4]

[fol. 115] Thus it has been that since 1934—more than 30 years—no Puerto Rican schooled in his native land has been required to become literate in English in the course of an elementary school education extending through the sixth grade—the level adopted by New York as the measure of its educational qualification. Although literate in Spanish—the language in which his schooling in Puerto Rico has been conducted—voting in New York is denied him solely because of his lack of literacy in English. Section 4(e) represents a Congressional judgment that this is not in keeping with long-standing Congressional policies towards Puerto Rico, and that the New York policy should yield to the federal.[5] That is a judgment which, in my view, Congress is entitled to make by reason of the authority and responsibility assigned to it by the Constitution to provide for Puerto Rico and its people. It is not claimed, as it cannot be, that the present status of

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[4] Although Puerto Rico has often been the recipient of funds for educational assistance voted by Congress, these grants have never been conditioned upon instruction in English and have been made knowingly in the light of the use in Puerto Rico of Spanish as the official teaching language.

[5] In the Senate, both of the New York Senators, Javits and Kennedy, who sponsored Section 4(e), stressed the inequity of denying the vote to Puerto Ricans who had been educated in Spanish as a consequence of Congressional policies. Senator Kennedy pointed out that (111 Cong. Rec. 10675):

> In school [the typical educated Puerto Rican] reads, in Spanish, the same textbooks which his fellow citizen on the mainland reads in English. That his schooling takes place in Spanish is not up to him, but is due to the fact that the U. S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico, to make Puerto Rico a showcase for all of Latin America.

Representatives Ryan and Gilbert from New York were the House proponents of Section 4(e). They concurred in emphasizing the "anomaly" of Congressional action "to encourage the perpetuation of Puerto Rico's Spanish language culture and at the same time do nothing to protect the rights of citizenship of Puerto Ricans who move to other sections of the country." 111 Cong. Rec. 15666.

Puerto Rico has nullified completely such authority and responsibility.

[fol. 116] It may be urged that, since Section 4(e) purports on its face to be a declaration of rights under the Fourteenth Amendment, only that Amendment may be looked to as a measure of the underlying Congressional power. That may well be true if we were dealing with the statute's applicability to persons not within the reach of any other constitutional power. It does not seem to be a necessary conclusion in respect of the Puerto Ricans about whom this lawsuit has been brought and with respect to whom relief is sought. As my colleagues recognize, acts of Congress are to be approached in the first instance as if they were constitutional. Whether this be couched in the language of presumptions, or simply in terms of the comity appropriate between coordinate branches of the same government, it remains true that courts do not invalidate acts of Congress until the search for a foundation for them has been exhausted.

We are concerned here with what Congress has done, and not only with what it has said. If it chooses to characterize the voting status it has elected to confer on Puerto Rican citizens as one within the scope of the Fourteenth Amendment, the validity of that status still turns upon whether Congress can create it, not upon what Congress calls it. That power to create does not have to be discovered solely in the Fourteenth Amendment. It may or may not be there. But that is a question that need not be resolved in the context of this case, involving, as it does, Puerto Ricans who are the objects of Congressional concern under other provisions of the Constitution.

Absent an assertion of overriding federal power, it is presumably the privilege of the people of New York to [fol. 117] insist that Puerto Ricans shall, in order to vote, be literate in English. *Camacho* v. *Doe*, 7 N. Y. 2d 763 (1959); and see *Lassiter* v. *Northampton Election Board*, 360 U.S. 45 (1959). But with the enactment of Section 4(e), a new element is added; and thereafter it is the function of the Supremacy Clause to elevate Congressional policy over New York policy, valid and enforceable

though the latter may formerly have been.[6] If it be said that Art. IV, § 3, is to be read narrowly as limiting Congress to making the rules whereby life is to be carried on in Puerto Rico, the answer is that it has not been so regarded. At least one of the Insular Cases, *Downes* v. *Bidwell*, 182 U. S. 244 (1901), dealt with the regulation of Puerto Rico's external trade by means of the imposition of duties at American ports of entry. Justice Brown, in an opinion supporting the decision that such duties could be imposed by Congress in the exercise of its powers under the territorial clause, characterized that clause as "absolute in its terms, and suggestive of no limitations [fol. 118] upon the powers of Congress in dealing with (the territories)." Admittedly, Article IV, Section 3, is terse,[7] and its reach must be defined primarily by refer-

[6] The challenge here made to Section 4(e) goes mainly to the existence of Congressional power, and not to the propriety, in terms of reasonableness, of this particular exercise of it. This emphasis is tactically well-advised, since there would appear to be little doubt on the latter score. Other states having large non-English-speaking elements have not emulated New York in barring them from voting. In Hawaii, persons literate either in English or Hawaiian may vote, Rev. Laws of Hawaii (1955), Sec. 11-8. The Louisiana Constitution has long required as a voting qualification only literacy either in English or a mother tongue. New Mexico, in deference to its large Spanish-speaking population, has no English literacy requirement and prints its ballots and instructions in both Spanish and English. N. Mex. Statutes (1953), §§ 3-3-7, 3-3-12, 3-2-41. Thus the impact of Section 4(e) in New York is one which Congress might well have viewed with equanimity, especially in the light of the national interests which it was thought to advance.

[7] The reason why the "question of territories was dismissed with a single clause" was not, in Justice Brown's view, far to seek. It lay in the fact that "the vast possibilities of that future (of the geographical sway of the Constitution) could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe; were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghenies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession under the

ence to the wisdom and necessity of its manifold applications in the light of what the Framers would have intended could they, in Justice Brown's phrase, have "foreseen that, within little more than one hundred years, we were destined to acquire not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in American and distant islands in the Pacific . . ."

An expansive view of the sweep of Congressional authority under the territorial clause has been the rule in Supreme Court interpretation of it in lawsuits presenting [fol. 119] a wide range of issues.[8] The conspicuous exception was Chief Justice Taney's opinion in *Dred Scott* v. *Sandford*, 60 U.S. 393 (1956), and that is not widely regarded as one of the Court's happier forays into constitutional exegesis. The power seems to me to be, and

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treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation, and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the Convention centered upon surmounting these obstacles. . . ." 182 U.S. 284, 285.

[8] Statements are legion that Congress has broad powers over the territories and their inhabitants. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674 (1945); *Public Utility Comm'rs* v. *Ynchausti & Co.*, 251 U.S. 401, 406 (1920); *Binns* v. *United States*, 194 U.S. 486, 491 (1904); *Dooley* v. *United States*, 183 U.S. 151, 157 (1901). Such power has been explained as being required by the special problems created by the territories and the need for flexibility in dealing with them. *Balzac* v. *Porto Rico*, 258 U.S. 298 (1921); *Dorr* v. *United States*, 159 U.S. 149 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197, 218 (1903). Legislation by Congress pursuant to the territorial clause, and by territorial legislatures deriving their authority from the Congressional power, has frequently been sustained in circumstances where constitutional limitations might otherwise have been insuperable. *Balzac* v. *Porto Rico, supra; Public Utility Comm'rs.* v. *Ynchausti & Co., supra; Dowdell* v. *United States*, 221 U.S. 325 (1911); *Dorr* v. *United States, supra; Hawaii* v. *Mankichi, supra; Dooley* v. *United States, supra; Downes* v. *Bidwell*, 182 U.S. 244 (1901); see *Raband* v. *Boyd*, 353 U.S. 427, 432 (1957).

to have been intended to be, commensurate with all legitimate and relevant objects of national concern in our relationships with our territories and their peoples, and with the world at large. Assuring our Puerto Rican citizens a right to vote under the circumstances disclosed in this record could rationally have been deemed by Congress to be such an object. As such, its accomplishment by the vehicle of Section 4(e) is not beyond the range of Congressional power.

[fol. 120]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[File Endorsement Omitted]

Civil Action No. 1915-1965

JOHN P. MORGAN & CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS deB. KATZENBACH, as Attorney-General of the United States, the UNITED STATES, and the NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, DEFENDANTS

ORDER AND JUDGMENT—December 7, 1965

Upon consideration of the Plaintiffs' motion for summary judgment, and the Defendants' cross-motion for summary judgment, and upon the written opinion delivered by this Court dated November 15, 1965, and for the reasons therein stated, it is

ORDERED, that the Defendants' cross-motion for summary judgment be, and the same hereby is, denied, and it is further

ORDERED, that the Plaintiffs' motion for summary judgment be, and the same hereby is, granted, and it is

ORDERED, that defendant Katzenbach be, and he hereby is, enjoined from taking any steps to enforce Section 4(e) of the Voting Rights Act of 1965, or to execute the same, and it is ORDERED, that the Defendants constituting the New York City Board of Elections be, and they hereby are, enjoined from giving any effect to the said Section 4(e) of the Voting Rights Act of 1965, and it is

~~ORDERED, that the Defendants constituting the New~~ York City Board of Elections shall, not later than February 1, 1966, inform the attorney for the plaintiffs herein whether the number of persons registered to vote on account of Section 4(e) of the Voting Rights Act of 1965 who were ineligible to vote according to New York State law, and who actually voted in the elections held in New York City in November, 1965, for any office voted on therein, insofar as this can be ascertained, exceeded in any such case the plurality of any person elected in that election, and which such persons, and it is ORDERED, that based on this information plaintiffs shall have leave to apply for usch ancilliary relief as they may be advised, ~~and it is~~

ORDERED, that a declaratory judgment be, and hereby is, granted, that Section 4(e) of the Voting Rights Act of 1965 is unconstitutional, ~~and it is~~

~~ORDERED, that the Clerk be, and he hereby is, directed to enter this Order as a Judgment without further notice.~~

Dated December 7, 1965

" " "

U.S.C.J.

/s/ Alexander Holtzoff
U.S.D.J.

/s/ Joseph C. McGarraghy
U.S.D.J.

[fol. 121] [CERTIFICATE OF SERVICE]

* * * *

[fol. 122]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed December 13, 1965

I. Notice is hereby given that Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States, defendants above named, hereby appeal to the Supreme Court of the United States from the order entered in this action on December 7, 1965.

This appeal is taken pursuant to 28 U.S.C. Sections 1252 and 1253.

[fol. 123] II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record below, including all pleadings, motions, transcripts of arguments, opinions, and orders of the District Court, and this notice of appeal.

III. The following question is presented by this appeal:

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional.

/s/ John Doar
JOHN DOAR
Assistant Attorney General

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT
Attorney
Department of Justice

/s/ Peter S. Smith
PETER S. SMITH
Attorney
Department of Justice

[fol. 124]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 125]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR A STAY OF THE ORDER AND JUDGMENT IN THE ABOVE-ENTITLED CASE DURING THE PENDENCY OF AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 13, 1965

Come now Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States, defendants in the above-entitled case, and file this motion for a stay of the order and judgment of this Court of December 7, 1965, during the pendency of an appeal to the Supreme Court of the United States, for the following reasons:

[fol. 126] 1. In holding that "Section 4(e) of the Voting Rights Act of 1965 is unconstitutional," this Court has exercised "the gravest and most delicate duty that . . . [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (opinion of Mr. Justice Holmes). The order of this Court forbids the Attorney General, the Nation's chief law enforcement officer, from enforcing a congressional enactment. The gravity of such an order makes it appropriate to stay its implementation until the Supreme Court, the final arbiter of such questions, is given the opportunity of review.

2. Staying an order which forbids the Attorney General to enforce a congressional enactment is particularly appropriate in the circumstances of this case since there clearly can be no irreparable injury to plaintiffs if such an order were granted. Should the Supreme Court affirm this Court's decision, it will be a simple process for the Board of Elections to

strike from the rolls those individuals who, in the interim, became registered by taking advantage of the provisions of Section 4(e) of the Voting Rights Act. On the other hand, should the order of this Court not be stayed, there is a substantial likelihood of irreparable injury to persons who might otherwise have registered under Section 4(e). The registration offices in New York City are open on a year-round basis. Hence many persons desiring to register in the coming months will be refused that [fol. 127] opportunity. Once denied the opportunity, they might find it inconvenient, or be discouraged from making another attempt months later, should the Supreme Court sustain the validity of this congressional enactment.

For the foregoing reasons, the defendants, Nicholas deB. Katzenbach and the United States, respectfully request this Court to stay its order and judgment of December 7, 1965, during the pendency of an appeal to the Supreme Court.

/s/ John Doar
JOHN DOAR
Assistant Attorney General

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT
Attorney
Department of Justice

/s/ Peter S. Smith
PETER S. SMITH
Attorney
Department of Justice

[fol. 128]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 129]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed December 20, 1965

I. Notice is hereby given that the New York City Board of Elections, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, defendants above named, hereby appeal to the Supreme Court of the United States from the order entered in this action on December 7, 1965.

This appeal is taken pursuant to 28 U.S.C. Sections 1252 and 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record below, including all pleadings, motions, transcripts of arguments, opinions, and orders of the District Court, and this notice of appeal.

[fol. 130] III. The following question is presented by this appeal:

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional.

/s/ Leo A. Larkin
LEO A. LARKIN
Corporation Counsel of the
City of New York

/s/ Morris Einhorn
MORRIS EINHORN
Assistant Corporation Counsel of
the City of New York

[fol. 131]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 132] • • •

[fol. 133]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

MEMORANDUM ORDER GRANTING STAY OF ORDER AND JUDGMENT—December 21, 1965

Motion of the defendant Attorney General and the defendant United States for a stay of the enforcement of the order and judgment of this Court, is granted on condition that the defendant Members of the New York City Board of Elections maintain a separate roster of all voters who qualify pursuant to the provisions of Section 4 (e) of the Voting Rights Act of 1965 and are registered thereunder, during the pendency of the appeal.

/s/ Alexander Holtzoff
U.S.D.J.

/s/ Joseph C. McGarraghy
U.S.D.J.

/s/ Carl McGowan
U.S.C.J.

December 21, 1965.

[fol. 134]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 135]

SUPREME COURT OF THE UNITED STATES

Nos. 847 and 877, October Term, 1965

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, et al., APPELLANTS

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

NEW YORK CITY BOARD OF ELECTIONS, ETC., APPELLANT

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

APPEALS from the United States District Court for the District of Columbia.

ORDER NOTING PROBABLE JURISDICTION—
January 24, 1966

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 203760 842

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NICHOLAS DEB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, AND THE UNITED STATES, APPELLANTS

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Columbia (not yet reported) is set forth in Appendix A, *infra*, pp. 7–33.

JURISDICTION

By an order and judgment entered December 7, 1965 (Appendix B, *infra*, pp. 34–35), the statutory three-judge district court, convened pursuant to 28 U.S.C. 2282, enjoined the enforcement of Section 4(e) of the Voting Rights Act of 1965 (P.L. 89–110, 79 Stat. 439) on the ground of its unconstitutionality. A notice of appeal to this Court was filed on December 13, 1965. The jurisdiction of this Court to review the decision

797-088—65——1

of the district court rests upon 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4(e) of the Voting Rights Act of 1965 and the pertinent parts of Article II, Section 1, of the New York Constitution and Sections 150 and 168 of the New York Election Law (McKinney's Consolidated New York Laws Ann.) are reproduced in Appendix C, *infra*, pp. 36–37.

QUESTION PRESENTED

Whether Section 4(e) of the Voting Rights Act of 1965 is a constitutional exercise of Congressional power.

STATEMENT

Section 4(e) of the Voting Rights Act of 1965 (P.L. 89–110, 79 Stat. 439), as applicable here, prohibits denial of the right to vote of any person in any federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language if he demonstrates that he has successfully completed six grades in a public school or an accredited private school in Puerto Rico in which the predominant classroom language was other than English. The Act became effective on August 6, 1965. On the same day, appellees, a husband and wife who are registered voters in Kings County, New York, filed their complaint in the district court seeking to enjoin the Attorney General from enforcing the provisions of Section 4(e) of the Act. In their complaint, they asserted that there were large numbers of Puerto Rican Americans living

in Kings County who were unable to read and write the English language and therefore ineligible to register to vote under New York law; that, notwithstanding the requirements of State law, the election officials of New York City were registering Puerto Rican Americans who had completed six grades of public school in Puerto Rico, upon the ground that they had become eligible by the terms of the Voting Rights Act of 1965; and that the votes of these persons registered in compliance with the federal law would unconstitutionally dilute the votes of the appellees.

A three-judge court was convened pursuant to 28 U.S.C. 2282. The Board of Elections of the City of New York was added as a defendant upon motion of the appellees, the United States was added as a defendant on its own motion, and the case was submitted on cross-motions for summary judgment, supported by affidavits. The district court, in an opinion signed by District Judges Holtzoff and McGarraghy, ruled that Congress had exceeded its constitutional powers in enacting Section 4(e). Circuit Judge McGowan dissented. Thereafter, on December 7, 1965, the court entered its formal order permanently enjoining the Attorney General from taking any steps to enforce Section 4(e) of the Voting Rights Act of 1965 and enjoining the New York City Board of Elections from giving any effect to that section.

On December 13, 1965, the Attorney General and the United States filed notice of appeal and moved the district court to stay its order pending appeal to

this Court. The district court has not yet ruled on the motion for a stay.

THE QUESTIONS ARE SUBSTANTIAL

The issue presented by this appeal is of obvious importance. The court below has declared unconstitutional a section of the Voting Rights Act of 1965, with the result that large numbers of literate but non-English-speaking American citizens born and educated in Puerto Rico and now living on the mainland remain disfranchised despite a Congressional determination that they should be permitted to vote.[1]

The practical impact of the order entered is of national scope. Not only does the decision affect the Puerto Rican residents of New York City, but the Attorney General is permanently enjoined from enforcing Section 4(e) of the Voting Act anywhere in the United States. Furthermore, the holding below is in direct conflict with the decision of another three-judge district court. *United States* v. *County Board of Elections of Monroe County, New York, et al.*, Civ. No. 11590 (W.D. N.Y., decided December 8, 1965). That court unanimously sustained the constitutionality of Section 4(e) of the Voting Rights Act. In light of this conflict of decisions and the importance of the issue involved, it is clear that the case demands plenary consideration.

We further suggest that the case should be set down for argument this Term. Primary elections sched-

[1] According to the New York City Board of Elections, 8,107 Spanish-speaking residents in the City had qualified to vote in 1965 on the basis of Section 4(e) of the Voting Rights Act. See *The New York Times*, November 16, 1965, p. 37.

uled for late June, 1966, and general elections in early November, 1966, should not be embarrassed by doubts concerning the qualification to vote of the intended beneficiaries of Section 4(e) of the Voting Rights Act. We are advised that all parties are agreeable to a somewhat accelerated briefing schedule that would permit the Court to dispose of the case at its current Term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted and the cause set down for argument this Term.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1965.

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 1915–65

JOHN P. MORGAN AND CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS DEB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, AND NEW YORK CITY BOARD OF ELECTIONS: CONSISTING OF JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, AND JOHN R. CREWS, DEFENDANTS

Before McGOWAN, Circuit Judge, HOLTZOFF, District Judge, and McGARRAGHY, District Judge.

HOLTZOFF, District Judge. The question presented in this case is whether the Congress has constitutional power to regulate by statute the qualifications of voters and to supersede the requirements prescribed by the States. Specifically the issue is the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which in effect provides that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting under any literacy test. As a corollary, the ultimate problem is whether this provision of the Act of Congress supersedes the literacy test for voters prescribed by the constitution and

statutes of the State of New York, which impose the ability to read and write English as a requirement for voting.

The action is brought by voters in the City of New York, who claim that the weight of their votes is being adversely affected by the fact that numerous citizens living in New York City, who have migrated from Puerto Rico and who read and write only in the Spanish language, are being permitted by the local authorities to vote in disregard of the State literacy test and in compliance with the Act of Congress, which the plaintiffs claim is unconstitutional when it conflicts with State law. The defendants are the Attorney General of the United States and the members of the Board of Elections of the City of New York. The plaintiffs seek a declaratory judgment and an injunction restraining compliance with the Act of Congress. In view of the fact that this action is brought to enjoin the enforcement of an Act of Congress on the ground of its repugnance to the Constitution of the United States, a statutory three-judge court was convened, 28 U.S.C. §§ 2282 and 2284. The United States has been permitted to intervene in support of the validity of the Act of Congress, 28 U.S.C. § 2403, and Rule 24(a) of the Federal Rules of Civil Procedure. The Attorney General of the State of New York has filed a brief as *amicus curiae* in support of the plaintiffs' contention.

The plaintiffs clearly have a standing to sue. A voter who claims that the weight of his vote is being diluted or impaired by the ballots of others who are not legally entitled to vote, has a right to challenge their right of suffrage and to bring appropriate proceedings to prevent their votes from being cast or counted.[1]

[1] *Gray* v. *Sanders*, 372 U.S. 368, 374–5.

The Voting Rights Act of 1965 (Act of August 6, 1965, Public Law 89-110, U.S. Code Congressional and Administrative News, pp. 2326 *et seq.*) Section 14(b), provides as follows:

> (b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

This provision confers on this Court exclusive jurisdiction of this action. In fact the Attorney General of the United States concedes that this Court has jurisdiction, although the Corporation Counsel of the City of New York contests it. We conclude that jurisdiction exists.[1] The matter is before the Court on cross-motions for summary judgment.

The Constitution of the State of New York, Article II, Section 1, which defines the qualifications of voters, provides, in part, as follows:

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

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[1] Cf. *McCann* v. *Paris* (W.D.-Va. 1965) 244 F. Supp. 870, dismissing for lack of jurisdiction an action challenging the validity of another provision of the Voting Rights Act, and holding that this court alone has jurisdiction of the subject matter.

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This requirement is reiterated in Section 150 of the Election Laws of the State of New York,[3] the pertinent provision of which reads as follows:

> In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English.

It appears from the papers annexed to the motions before the Court and it is undisputed that beginning in about 1940 there was a large migration to New York City of citizens of the United States from Puerto Rico, and that there are several hundred thousand such persons now living in New York. About half of them are unable to read or speak English, but many of them are able to read and write Spanish, because the public schools of Puerto Rico are conducted largely in that language. Thus there is a large group of American citizens residing in New York who are disqualified from voting because of the New York literacy test. It is reasonable to assume that undoubtedly there are other citizens who are also unable to meet the literacy test and are likewise disqualified from voting.

The Voting Rights Act of 1965, which was enacted by Congress and became law on August 6, 1965, as heretofore stated, contains the following provision in Section 4(e):

> (e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is neces-

[3] McKinney's Consolidated Laws of New York, Book 17, p. 327.

sary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

If the foregoing Congressional provision is valid, it *pro tanto* nullifies the constitutional and statutory provisions of New York state, which impose an English literacy test on voters. It would require New York not to apply the literacy requirement exacted by its constitution and laws to voters who have been educated in a public school, or accredited private school, in any State, territory, District of Columbia, or the Commonwealth of Puerto Rico, in which the predominant language was other than English. The constitutional and statutory enactments of the State of New York would be abrogated and nullified to that extent.

It is urged by the plaintiffs that the Congressional enactment is invalid and unconstitutional. The Vot-

ing Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. Potent machinery is created by the statute to achieve this end. Section 4(e) is, however, completely and entirely disassociated from the rest of the Act and constitutes no part of the scheme of the legislation. The measure originated in the Senate. Section 4(e) was not in the bill as reported by the Senate Committee on the Judiciary. It was inserted by an amendment from the floor. After the bill passed the Senate, the House of Representatives struck out the entire bill except the enacting clause and substituted a different measure, which again did not include any such provision. Section 4(e) was, however, re-inserted by the Conference Committee and remained in the measure as finally passed. It is quite apparent that the Section did not receive consideration by any legislative Committee in either House. While Section 4(e) was directed at the Puerto Rican situation in New York, which has already been briefly described, actually it is much broader in its phraseology and scope and conceivably may be applicable to many other citizens who are illiterate in English, and is effective throughout the United States.

Traditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate. Thus Article I, Section 2, of the Constitution of the United States, provides as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

It will be observed that this Section does not include the power to prescribe requisites for the right of suffrage. Power to make or alter regulations concerning "the times, places and manner of holding elections" does not comprise authority to regulate qualifications for voters. No express or implied power is conferred by the Constitution on Congress to legislate concerning requirements for voters in the several States. The matter is within the purview of the Tenth Amendment, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States. In *Minor* v. *Happersett,* 21 Wall. 162, 177, Mr. Chief Justice Waite, in speaking for a unanimous bench, stated:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

In that case it was held that the States had the power of excluding women from the right to vote. It required a Constitutional amendment to grant suffrage to women.

In *Pope* v. *Williams*, 193 U.S. 621, 632, the same theory was again enunciated:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* [Emphasis supplied.]

The doctrine that the right to vote is not a privilege derived from the United States, but is conferred by the State, was reiterated in *Breedlove* v. *Suttles*, 302 U.S. 277, 283, in the following manner:

> Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.* [Emphasis supplied.]

In that case the Supreme Court unanimously held that the States had power to impose a poll tax as a prerequisite for voting. It required a Constitutional Amendment to eliminate the exaction of poll taxes as a condition precedent to voting in Federal elections.

Only within the past year the Supreme Court again

restated the same propositions in *Carrington* v. *Rash*, 380 U.S. 89, 91, as follows:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams*, 193 U.S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.* 360 U.S. 45, 50. Compare *United States* v. *Classic*, 313 U.S. 299; *Ex parte Yarbrough*, 110 U.S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams*, *supra*, at 632.

This case will be hereafter discussed in another connection.

The case of *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, decided in 1959, is practically on all fours with the case at bar. The State of North Carolina prescribed a literacy test for voters in the English language. A voter brought suit in the Federal court for a declaration that the requirement was unconstitutional. The Supreme Court unanimously upheld the validity of the test and the power of the State to impose it. In its opinion, which was written by Mr. Justice Douglas, the Court discussed the authority of the States *vis-a-vis* the power of the Congress in this field, in the following illuminating manner, p. 50:

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams,* 193 U.S. 621, 633; *Mason* v. *Missouri,* 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns. Article 1, § 2 of the Constitution in its provision for the election of Members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People". Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature". So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough,* 110 U.S. 651, 663–665; *Smith* v. *Allwright,* 321 U.S. 649, 661–662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic,* 313 U.S. 299, 315. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of "the right to vote", the right protected "refers to the right to vote as established by the laws and constitution of the State". *McPherson* v. *Blacker,* 146 U.S. 1, 39.

There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the

United States to vote on account of race, color, or previous condition of servitude:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. That Amendment reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The latest Constitutional Amendment in this field is the Twenty-fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. That Amendment reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous

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and invariable view of the Congress that it may
intrude into this field and does not have power
regulate the subject matter by legislative enactm
If Congress had the authority to take such act
by legislation, the use of the laborious process
amending the Constitution would have been an ex
cise in futility or at least unnecessary surplusage

In *Minor* v. *Happersett*, 21 Wall. 162, 175, to wh
reference has already been made, Mr. Chief Just
Waite adverted and commented on this point
follows:

> And still again, after the adoption of
> fourteenth amendment, it was deemed nec
> sary to adopt a fifteenth, as follows: "The ri
> of citizens of the United States to vote sh
> not be denied or abridged by the United Sta
> or by any State, on account of race, color,
> previous condition of servitude." The fo
> teenth amendment had already provided that
> State shall make or enforce any law wh
> should abridge the privileges or immunities
> citizens of the United States. If suffrage w
> one of these privileges or immunities, w
> amend the Constitution to prevent its be
> denied on account of race, &c.? Nothing
> more evident than that the greater must inclu
> the less, and if all were already protected w
> go through with the form of amending
> Constitution to protect a part?

There is indeed an inherent limitation on the Sta
implicit in the Equal Protection of the Laws cla
of the Fourteenth Amendment. The States
barred from making an unreasonable classification
tween various groups of citizens in determining w
should have the right to vote. Thus, in *Carrington*
Rash, 380 U.S. 89, *supra*, it was held that whil
State may impose reasonable residence requireme
for voting, it may not deny the ballot to a *bona*

resident merely because he is a member of the armed forces of the United States. In other words, the State is precluded from distinguishing between residents who are civilians and residents who are members of the armed services, on the ground that such a distinction is an unreasonable classification and discrimination in violation of the Equal Protection of the Laws clause.

This rule is inapplicable in the instant case, because in *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, from which we have already extensively quoted, it was held that a distinction between citizens who can read and write English and those who cannot, is not an unreasonable classification and does not violate the Equal Protection of the Laws clause. Moreover, what is involved in the case at bar is not the constitutionality of the New York State literacy test. Its validity is not assailed. What is presented here is the constitutionality of the Congressional enactment which would, in part, abrogate the law of the State.[4]

A veiled intimation that the New York literacy test was intended to exclude Spanish-speaking citizens from the franchise is both irrelevant in law and untenable in fact. The requirement was originally adopted in 1921—long before the large influx of Puerto Ricans into New York.

At the oral hearing in this case, the argument was advanced that the statutory provision here in question may be sustained as an exercise of the power of Congress to legislate for the territories under Article IV, Section 3, Paragraph 2, of the Constitution, which authorizes the Congress to "dispose of and make all needful Rules and Regulations respecting the Terri-

[4] The New York courts have sustained the validity of the literacy test. *Camacho* v. *Doe*, 7 N.Y. 2d 763, 194 N.Y. Supp. 2d 33, affirming 221 N.Y. Supp. 2d 262.

tory or other Property belonging to the United States." It is contended that since Section 4(e) relates to citizens of the United States who had been residents of Puerto Rico, therefore, the power of Congress to legislate for the Government of Puerto Rico embraces the authority to enact this provision. There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited nor directed solely to Puerto Ricans and, therefore cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved. No persuasive authority is cited in support of the contention of Government counsel on this point.

We have given due consideration to the presumption of validity which attaches to every Act of Congress. That presumption, however, is completely overcome and destroyed by the inescapable conclusion that we have reached from the foregoing discussion to the effect that Section 4(e) of the Voting Rights Act of 1965, transgresses the powers granted to Congress and, therefore, is repugnant to the Constitution and invalid.

Much of the oral argument and of the written material submitted in behalf of the Government, is intended to demonstrate what is claimed to be the unfairness of excluding from the right to vote in New York, those Puerto Ricans who can read and write Spanish, but are not literate in English. No matter how weighty and cogent such an argument may be,

and we express no opinion on this subject, it should be addressed to the Legislature of New York State, rather than to the courts. It is hardly necessary to say that expediency, desirability, and policy of legislation are not the concern of the judiciary. We pass alone on the power to enact the legislation. If any remedy is necessary or desirable, an amendment to the Constitution of the State of New York, possibly implemented by legislation, would seem to be the appropriate recourse and not Congressional legislation.

We conclude that Section 4(e) of the Voting Rights Act of 1965 is unconstitutional. Accordingly, the plaintiffs' motion for summary judgment is granted, and the defendants' cross-motions for summary judgment are denied. Counsel may submit an appropriate order.

McGarraghy, District Judge, concurs.

ALEXANDER HOLTZOFF,
United States District Judge.

JOSEPH C. MCGARRAGHY,
United States District Judge.

NOVEMBER 15, 1965.

Morgan v. *Katzenbach*
Civil Action No. 1915–65

MCGOWAN, *Circuit Judge, dissenting:* With all respect, I do not join in the disposition made by my colleagues of this challenge to Section 4(e) of the Voting Rights Act of 1965. Theirs is a persuasive statement of the difficulties which attend upon Congressional assertion of a power which has not been expressly granted to the federal legislature in the Constitution, and which may, therefore, be thought to have been reserved to the states by the Tenth

Amendment. The prescription of voter qualifications is arguably such a power. But those difficulties do not obtain where a foundation for the Congressional action can be found in a power which has explicitly been reposed in the legislative branch of the federal establishment and the emanations of which speak to the states in the compelling accents of the Supremacy Clause.

I think, unlike my brethren, that a foundation of this kind is discernible for Section 4(e) as against the precise and limited attack made upon it in this record. That foundation resides, as a minimum, in the grant by the Framers to Congress of power to "make all needful Rules and Regulations" in respect of the territories.[1] The majority say that Section 4(e) cannot be appraised by reference to this grant because it is in terms "neither limited or directed solely to Puerto Ricans." But the complaint which plaintiffs make about Section 4(e) is confined to al-

[1] *U.S. Const.* art. IV, § 3. Puerto Rico came under American rule by virtue of the Treaty of Paris of 1899, ending the Spanish-American War. That treaty provided, among other things, that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by Congress." 30 Stat. 1754, at 1759. Section 4(e) could, thus, perhaps be regarded as legislation in furtherance of a valid treaty, finding its ultimate authority in the Treaty Power. Art. II, § 2. The New York City Board of Elections has pressed upon us quite strongly another international engagement of the United States in the form of the United Nations Charter. 59 Stat. 1045. Article 55 of the Charter commits the organization to the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; and the individual signatories are bound to seek to achieve these purposes. I do not think it necessary to base Section 4(e) upon these treaties. They are suggestive of the climate in which Congress presumably approaches its responsibilities under its Art. IV, § 3, powers.

legedly illegal voting by Puerto Ricans; and it seems to me that we are not only authorized, but indeed required under sound principles of constitutional adjudication, to restrict our consideration of the validity of this statute to the particular application of it which, so the plaintiffs themselves tell us, brings them into court.

Thus it is that I do not purport to decide anything about Section 4(e) except in respect of our Puerto Rican citizens resident in New York. As to them, however, I think that Congress has an independent base of legislative power which, wholly apart from the Fourteenth and Fifteenth Amendments, enables Congress to regulate rights of suffrage even in the face of adverse state action. This proposition can perhaps best be both explained and tested by a hypothetical case. Let us suppose that, in these troubled times of 1965, it was determined to be in our national interest for a non-English-speaking country to come into our possession in the status of a territory. Wholly aside from such treaty obligations as we might assume in connection with that accession, it seems evident that we might wish to deal with its inhabitants in a way which would commend itself to our own sense of justice and the fitness of things, as well as to the eyes of a world which has become increasingly sensitive about such matters. Congress, with these considerations in mind, adopts a statute which (1) confers extensive rights of self-government upon the territory, including arrangements which admit of the perpetration of its cultural heritage through the continued use of the native language in the conduct of the public schools, (2) endows the inhabitants with full American citizenship, including the free right to enter the United States and to take up residence here, and (3) provides that any such person exercising this

last-mentioned right shall be privileged to vote in all elections in the state of his residence if his educational attainments are the equivalent of those required of his fellow-citizens, except that they issue in literacy in his native language rather than in English.

I should suppose that there would be little doubt of the power of Congress to enact such a law as a part of its constitutional authority and responsibility for the governance of the territories. And, being an appropriate exercise of an express grant of federal legislative power, it would, under the Supremacy Clause, prevail over any state enactment in conflict with it. I take the Congressional power to make rules and regulations for the territories to comprehend laws relating to the status and rights of the people who inhabit those territories and prescribing that such status and rights are to be recognized throughout the United States as well as in the territory itself. This must be so, if the central purposes of such federal legislation as is hypothesized above are to be realized. To the extent that, as the majority suggest, this may perhaps operate to place citizens of differing national origins in differing positions *vis-a-vis* the right to vote, the answer is that citizens within the reach of the constitutional grant of power over the territories are inescapably and legitimately separated by that fact from citizens to whom it has never extended. And it is appropriate to reiterate that we are not called upon by this record to define the scope of Congressional power with respect to any of our citizens other than Puerto Ricans.

If, then, it be assumed that Congress could validly enact today a bill of the kind supposed, how closely could it be analogized in substance to what Congress has done over the years in the case of Puerto Rico? The parallel is, in my view, plain.

The controversies rampant at the time about the acquisition of Puerto Rico need not be raked over again. What did emerge from them on the part of most Americans was a unanimity of belief that, once acquired, Puerto Rico should be governed with due regard for the sensitivities of its people as well as world opinion. It was our national purpose to demonstrate, not least to our uneasy selves, that we had not been motivated by the narrow purposes of colonial conquest. There was a swelling impulse to set Puerto Rico on a path leading to a viable independence as speedily as that could be achieved, and an independence which, when it came, would carry with it a true option to preserve and extend a cultural tradition as venerable as our own. It was as if the goals we envisaged for Puerto Rico were as much tests of ourselves, undertaken in the searching glare of colonialist scepticism, as of the Puerto Ricans.

The response of Congress to these sentiments was immediate and sustained, establishing a tradition of enlightened treatment of Puerto Rico which is currently one of the firmest props of our pretensions to a respectful hearing in the councils of the world. Section 4(e) of the Voting Rights Act of 1965 is but the latest legislative act in this tradition. It was preceded by a series of Congressional efforts to advance Puerto Rico to a self-governing independence. The first was the Foraker Act in 1900, 31 Stat. 77, which left only the lower house of the territorial legislature and the Resident Commissioner to the United States to popular election by the Puerto Ricans. In the Jones Act of 1917, 39 Stat. 951, Congress brought the upper house under the same selection process, and gave the Governor of Puerto Rico, then subject to appointment by the President of the United States, the right to appoint four of the six Cabinet members.

In 1947, the Jones Act was further liberalized, 61 Stat. 770, by empowering the people of Puerto Rico to elect their own Governor, with the latter privileged to select all of his own Cabinet members.

These forward-looking measures were capped in 1950 by the law which authorized the Puerto Ricans to write their own organic law. 64 Stat. 319. The Senate Committee on Interior and Insular Affairs, reporting favorably on this proposal, said:

> This measure is designed to complete the full measure of local self-government in the island by enabling the 2¼ million American citizens there to express their will and to create their own territorial government. * * *
>
> Thus, in the only Latin-American area under the American flag, which is a focal point of inter-American relations, the present measure would give further concrete expression to our fundamental principles of government of, by, and for the people. It is a logical step in the process of political freedom and economic development that was begun even in the days of our military occupation of the island at the end of the last century.[1]

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[1] S. Rept. 1779, 81st Cong., 2d Sess. The Committee took cognizance of an earlier communication to it on behalf of the Secretary of State which said:

> It is believed that, with their own constitution, the high degree of internal self-government which the Puerto Ricans today enjoy in their voluntary association with the United States, will assume for them an added significance. Moreover, such action by our government would be in keeping with the democratic principles of the United States and with our obligations under the Charter of the United Nations to take due account of the political aspirations of the people in our Territories and to develop self-government in them.
>
> In view of the importance of 'colonialism' and 'imperialism' in anti-American propaganda, the Department of State feels that S. 3336 would have great value as a symbol of

When the Puerto Ricans availed themselves of the privilege afforded by this law and proceeded to adopt a Constitution, our own government acted to notify the United Nations that Puerto Rico was no longer a "non-self-governing nation" within the meaning of Article 73(e) of the Charter. Our official communication in this regard characterized the situation as follows (28 Dept. State Bulletin 587):

> By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.

The Constitution of Puerto Rico, which so came into being in 1952, described its relationship with the United States as in the nature of a "union." United States citizenship and freedom of movement, which are ordinarily associated with true political union, had long before been accorded to Puerto Ricans by Congress. The Jones Act in 1917 gave American citizenship to all Puerto Ricans, and permitted them free entry into this country. The Supreme Court once had occasion to characterize these provisions of the Jones Act as embodying a purpose to place Puerto Ricans "on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to

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the basic freedom enjoyed by Puerto Rico, within the larger framework of the United States of America.

enjoy all political and other rights." *Balzac* v. *Porto Rico*, 258 U.S. 298, 311 (1922).

The circumstance that Spanish has for many years been the language in which public school proceedings have been carried on is a closely-related consequence of Puerto Rico's steady march, under the Congressional aegis, towards self-government. Although Congress has never expressly directed that Spanish shall be the language of instruction, it has knowingly created and financed educational machinery which has encompassed that result. In the early years of American rule, English was employed in the public schools.[3] This caused many difficulties and local sentiment against it was strong, both for sentimental reasons and considerations of educational efficiency. Beginning in 1916, Spanish was used in the first four elementary grades, and in 1934 this was extended through the eighth grade. With the 1947 amendments to the Jones Act, the Commissioner of Education was appointed by the popularly elected Governor, and the use of Spanish was promptly extended to all grades. This has continued to be true since 1952 under the Puerto Rican Constitution.[4]

Thus it has been that since 1934—more than 30 years—no Puerto Rican schooled in his native land

---

[3] Under the Foraker and Jones Laws—the so-called Organic Acts—Congress vested authority over the Puerto Rican public schools in an Island Commissioner of Education. This official was a Presidential appointee from 1900 to 1947. His initial policy was to use Spanish in the first eight grades, and English in all others. This went on from 1900 to 1905, at which time English was used in all grades.

[4] Although Puerto Rico has often been the recipient of funds for educational assistance voted by Congress, these grants have never been conditioned upon instruction in English and have been made knowingly in the light of the use in Puerto Rico of Spanish as the official teaching language.

has been required to become literate in English in the course of an elementary school education extending through the sixth grade—the level adopted by New York as the measure of its educational qualification. Although literate in Spanish—the language in which his schooling in Puerto Rico has been conducted—voting in New York is denied him solely because of his lack of literacy in English. Section 4(e) represents a Congressional judgment that this is not in keeping with long-standing Congressional policies towards Puerto Rico, and that the New York policy should yield to the federal.[8] That is a judgment which, in my view, Congress is entitled to make by reason of the authority and responsibility assigned to it by the Constitution to provide for Puerto Rico and its people. It is not claimed, as it cannot be, that the present status of Puerto Rico has nullified completely such authority and responsibility.

---

[8] In the Senate, both of the New York Senators, Javits and Kennedy, who sponsored Section 4(e), stressed the inequity of denying the vote to Puerto Ricans who had been educated in Spanish as a consequence of Congressional policies. Senator Kennedy pointed out that (111 Cong. Rec. 10675):

> In school [the typical educated Puerto Rican] reads, in Spanish, the same text books which his fellow citizen on the mainland reads in English. That his schooling takes place in Spanish is not up to him, but is due to the fact that the U.S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico, to make Puerto Rico a showcase for all of Latin America.

Representatives Ryan and Gilbert from New York were the House proponents of Section 4(e). They concurred in emphasizing the "anomaly" of Congressional action "to encourage the perpetuation of Puerto Rico's Spanish language culture and at the same time do nothing to protect the rights of citizenship of Puerto Ricans who move to other sections of the country." 111 Cong. Rec. 15666.

It may be urged that, since Section 4(e) purports on its face to be a declaration of rights under the Fourteenth Amendment, only that Amendment may be looked to as a measure of the underlying Congressional power. That may well be true if we were dealing with the statute's applicability to persons not within the reach of any other constitutional power. It does not seem to be a necessary conclusion in respect of the Puerto Ricans about whom this lawsuit has been brought and with respect to whom relief is sought. As my colleagues recognize, acts of Congress are to be approached in the first instance as if they were constitutional. Whether this be couched in the language of presumptions, or simply in terms of the comity appropriate between coordinate branches of the same government, it remains true that courts do not invalidate acts of Congress until the search for a foundation for them has been exhausted.

We are concerned here with what Congress has done, and not only with what it has said. If it chooses to characterize the voting status it has elected to confer on Puerto Rican citizens as one within the scope of the Fourteenth Amendment, the validity of that status still turns upon whether Congress can create it, not upon what Congress calls it. That power to create does not have to be discovered solely in the Fourteenth Amendment. It may or may not be there. But that is a question that need not be resolved in the context of this case, involving, as it does, Puerto Ricans who are the objects of Congressional concern under other provisions of the Constitution.

Absent an assertion of overriding federal power, it is presumably the privilege of the people of New York to insist that Puerto Ricans shall, in order to vote, be literate in English. *Camacho* v. *Doe,* 7 N.Y.

2d 763 (1959); and see *Lassiter* v. *Northampton Election Board*, 360 U.S. 45 (1959). But with the enactment of Section 4(e), a new element is added; and thereafter it is the function of the Supremacy Clause to elevate Congressional policy over New York policy, valid and enforceable though the latter may formerly have been.* If it be said that Art. IV, § 3, is to be read narrowly as limiting Congress to making the rules whereby life is to be carried on in Puerto Rico, the answer is that it has not been so regarded. At least one of the Insular Cases, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), dealt with the regulation of Puerto Rico's external trade by means of the imposition of duties at American ports of entry. Justice Brown, in an opinion supporting the decision that such duties could be imposed by Congress in the exercise of its powers under the territorial clause, characterized that clause as "absolute in its terms, and suggestive of no limitations upon the powers of Congress in dealing with (the territories)." Admit-

* The challenge here made to Section 4(e) goes mainly to the existence of Congressional power, and not to the propriety, in terms of reasonableness, of this particular exercise of it. This emphasis is tactically well-advised, since there would appear to be little doubt on the latter score. Other states having large non-English-speaking elements have not emulated New York in barring them from voting. In Hawaii, persons literate either in English or Hawaiian may vote, Rev. Laws of Hawaii (1955), Sec. 11-8. The Louisiana Constitution has long required as a voting qualification only literacy either in English or a mother tongue. New Mexico, in deference to its large Spanish-speaking population, has no English literacy requirement and prints its ballots and instructions in both Spanish and English. N. Mex. Statutes (1953), §§ 3-3-7, 3-3-12, 3-2-41. Thus the impact of Section 4(e) in New York is one which Congress might well have viewed with equanimity, especially in the light of the national interests which it was thought to advance.

tedly, Article IV, Section 3, is terse,[1] and its reach must be defined primarily by reference to the wisdom and necessity of its manifold applications in the light of what the Framers would have intended could they, in Justice Brown's phrase, have "foreseen that, within little more than one hundred years, we were destined to acquire not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in American and distant islands in the Pacific * * *"

An expansive view of the sweep of Congressional authority under the territorial clause has been the rule in Supreme Court interpretation of it in law-

[1] The reason why the "question of territories was dismissed with a single clause" was not, in Justice Brown's view, far to seek. It lay in the fact that "the vast possibilities of that future (of the geographical sway of the Constitution) could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe; were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghenies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation, and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the Convention centered upon surmounting these obstacles. * * *" 182 U.S. 284, 285.

suits presenting a wide range of issues.[8] The conspicuous exception was Chief Justice Taney's opinion in *Dred Scott* v. *Sandford*, 60 U.S. 393 (1956), and that is not widely regarded as one of the Court's happier forays into constitutional exegesis. The power seems to me to be, and to have been intended to be, commensurate with all legitimate and relevant objects of national concern in our relationships with our territories and their peoples, and with the world at large. Assuring our Puerto Rican citizens a right to vote under the circumstances disclosed in this record could rationally have been deemed by Congress to be such an object. As such, its accomplishment by the vehicle of Section 4(e) is not beyond the range of Congressional power.

---

[8] Statements are legion that Congress has broad powers over the territories and their inhabitants. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674 (1945); *Public Utility Comm'rs* v. *Ynchausti & Co.*, 251 U.S. 401, 406 (1920); *Binns* v. *United States*, 194 U.S. 486, 491 (1904); *Dooley* v. *United States*, 183 U.S. 151, 157 (1901). Such power has been explained as being required by the special problems created by the territories and the need for flexibility in dealing with them. *Balzac* v. *Porto Rico*, 258 U.S. 298 (1921); *Dorr* v. *United States*, 159 U.S. 149 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197, 218 (1903). Legislation by Congress pursuant to the territorial clause, and by territorial legislatures deriving their authority from the Congressional power, has frequently been sustained in circumstances where constitutional limitations might otherwise have been insuperable. *Balzac* v. *Porto Rico*, *supra*; *Public Utility Comm'rs*, v. *Ynchausti & Co.*, *supra*; *Dowdell* v. *United States*, 221 U.S. 325 (1911); *Dorr* v. *United States*, *supra*; *Hawaii* v. *Mankichi*, *supra*; *Dooley* v. *United States*, *supra*; *Downes* v. *Bidwell*, 182 U.S. 244 (1901); see *Rabang* v. *Boyd*, 353 U.S. 427, 432 (1957).

APPENDIX B

Civil Action No. 1915-1965

Harry M. Hull, Clerk

[Filed Dec. 7, 1965]

United States District Court for the District of Columbia

JOHN P. MORGAN & CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS DEB. KATZENBACH, AS ATTORNEY-GENERAL OF THE UNITED STATES, THE UNITED STATES, AND THE NEW YORK CITY BOARD OF ELECTIONS, CONSISTING OF JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, AND JOHN R. CREWS, DEFENDANTS

ORDER AND JUDGMENT

Upon consideration of the Plaintiffs' motion for summary judgment, and the Defendants' cross-motion for summary judgment, and upon the written opinion delivered by this Court dated November 15, 1965, and for the reasons therein stated, it is

ORDERED, that the Defendants' cross-motion for summary judgment be, and the same hereby is, denied, and it is further

ORDERED, that the Plaintiffs' motion for summary judgment be, and the same hereby is, granted, and it is

ORDERED, that defendant Katzenbach be, and he hereby is, enjoined from taking any steps to enforce Section 4(e) of the Voting Rights Act of 1965, or to execute the same, and it is ORDERED, that the Defendants constituting the New York City Board of Elections be, and they hereby are, enjoined from giving any effect to the said Section 4(e) of the Voting Rights Act of 1965, and it is

ORDERED, that a declaratory judgment be, and hereby is, granted, that Section 4(e) of the Voting Rights Act of 1965 is unconstitutional.

------- ------,
U.S.C.J.

ALEXANDER HOLTZOFF,
U.S.D.J.

JOSEPH C. MCGARRAGHY,
U.S.D.J.

Dated DECEMBER 7, 1965.

APPENDIX C

Constitutional and Statutory Provisions Involved

Section 4(e) of the Voting Rights Act of 1965 P.L. 89-110, August 6, 1965, 79 Stat. 437, 439):

> (e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Article II, Section 1, of the New York Constitution (in pertinent part):

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

Section 150, McKinney's Consolidated Laws of New York Ann., Election Law (in pertinent part):

> * * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A "new voter," within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.

Section 168, McKinney's Consolidated Laws of New York Ann. (1965 Supp.), Election Law (in pertinent part):

> 2. * * * But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1965

No. 677

[38241]

FILED

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NICHOLAS DeB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, THE UNITED STATES, and NEW YORK CITY BOARD OF ELECTIONS, consisting of JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, and JOHN R. CREWS,

Appellants,

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT OF APPELLANT NEW YORK CITY BOARD OF ELECTIONS

LEO A. LARKIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

NICHOLAS DEB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, THE UNITED STATES, and NEW YORK CITY BOARD OF ELECTIONS, consisting of JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, and JOHN R. CREWS,

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---

JURISDICTIONAL STATEMENT OF APPELLANT NEW YORK CITY BOARD OF ELECTIONS

Opinion Below

The opinion of the United States District Court for the District of Columbia (not yet reported) is set forth in Appendix A, pp. 7-33.*

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* Appendix references herein are to the appendices contained in the jurisdictional statement filed by the Attorney General of the United States in this case.

Jurisdiction

By an order and judgment entered December 7, 1965 (Appendix B, pp. 34-35), the statutory three-judge district court, convened pursuant to 28 U.S.C. 2282, enjoined the enforcement of Section 4(e) of the Voting Rights Act of 1965 (P.L. 89-110, 79 Stat. 439) on the ground of its unconstitutionality. A notice of appeal to this Court was filed on December 20, 1965 by the New York City Board of Elections, and on December 13, 1965 by both Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States. The jurisdiction of this Court to review the decision of the district court rests upon 28 U.S.C. 1252 and 1253.

Constitutional and Statutory Provisions Involved

Section 4(e) of the Voting Rights Act of 1965 and the pertinent parts of Article II, Section 1, of the New York Constitution and Sections 150 and 168 of the New York Election Law (McKinney's Consolidated New York Laws Ann.) are reproduced in Appendix C, pp. 36-37.

Question Presented

Whether Section 4(e) of the Voting Rights Act of 1965 is a constitutional exercise of Congressional power.

Statement and Substantial Nature of the Questions Presented

The New York City Board of Elections respectfully refers this Court to the Jurisdictional Statement filed by appellants Nicholas deB. Katzenbach, as Attorney General

of the United States, and the United States, and rests thereon. This appellant agrees with the Solicitor General of the United States Department of Justice that the questions presented are substantial and that probable jurisdiction should, therefore, be noted and the cause set down for argument this Term.

December 1965

LEO A. LARKIN,
Corporation Counsel of the City of New York, Attorney for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 847

NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *Appellants*

v.

JOHN P. MORGAN and CHRISTINE MORGAN

No. 877

NEW YORK CITY BOARD OF ELECTIONS, ETC., *Appellant*

v.

JOHN P. MORGAN and CHRISTINE MORGAN

Appeals From the United States District Court for the District of Columbia

---

Brief of Commonwealth of Puerto Rico as Amicus Curiae in Support of Appellants

---

INTEREST OF AMICUS CURIAE

This case concerns the validity of federal legislation that enables Puerto Ricans in New York to substitute completion of a sixth grade education in an accredited Spanish language school in Puerto Rico for the New

York State English literacy test in determining voting eligibility. The Commonwealth of Puerto Rico is deeply interested in the outcome of the case. It has long been concerned with the well-being and progress of the thousands of Puerto Ricans who, as citizens of the United States, under the spirit of the United States-Puerto Rico association and inspired largely by the hope for a better job, have moved from Puerto Rico to the mainland of the United States. The Commonwealth Government neither encourages nor discourages migration. It has, however, long maintained a program of instruction for those on the island who are contemplating the move to the states, has established Puerto Rico Department of Labor offices in major cities to assist both migrants and their new hosts in the adjustment process and, through its Labor Department Migration Division, carries on extensive programs in mainland cities to urge Puerto Rican migrants to go to night school, improve skills and learn English—all in order that they may play a more constructive and creative role in the new communities they have chosen to join. Furthermore, it is important to the Commonwealth that the legal aspects of the present relationship between the United States and Puerto Rico which may be considered in connection with this case be carefully set forth in this Court.

For these reasons the Commonwealth of Puerto Rico has decided to file this brief as an amicus curiae.

SUMMARY OF ARGUMENT

Section 4(e) of the Voting Rights Act of 1965[1] is a valid exercise of Congressional power under the Fourteenth Amendment. The purpose of the legisla-

[1] 79 Stat. 439 (1965).

tion is to override the conflicting portions of the Constitution of New York and of the New York election law[2] which deprive of their right to vote a class of literate and native born United States citizens educated in American-flag schools. This purpose is clearly within the scope of the Fourteenth Amendment. Congress has chosen an appropriate means to achieve this purpose. That means is the substitution of educational proof for the New York English literacy test. Section 4(e) is appropriate legislation under the Fourteenth Amendment for these reasons and also in view of the historic policies adopted by Congress in its close and creative relationship with Puerto Rico.

ARGUMENT

THE ENACTMENT OF SECTION 4(e) IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE FOURTEENTH AMENDMENT AND OTHER PROVISIONS OF THE CONSTITUTION

A. Congress Enacted Section 4(e) in Implementation of Its Historical Policies Toward Puerto Rico

The Congressional judgment in enacting Section 4 (e) is in any case entitled to great weight and respect. The history of the close and special relationship between the United States and Puerto Rico and the role of Congress in the evolution of that relationship lend additional powerful support to the constitutionality of the legislation. We shall accordingly discuss first, in Section A, the special considerations arising from this relationship and will then discuss, in Sections B and C below, certain further factors which support the validity of the legislation.

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[2] N.Y. Const. art. II, § 1; N.Y. Election Law §§ 150, 162, 168, as amended, N.Y. Election Law § 168 (McKinney Supp. 1965).

1. The nature of the United States-Puerto Rico relationship

American political genius has built up over the course of the years a unique and mutually advantageous association between the United States and Puerto Rico. By virtue of this association there is now included within the American community an island entity of two and one-half million people with a distinct culture, tradition and language.

In 1898, through the Treaty of Paris, Spain ceded Puerto Rico to the United States.[3] The Treaty specifically provided for Congressional regulation: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[4] Treaties are, of course, the "supreme Law of the Land."[5]

There are other sources which can be cited to support Congressional power over the Puerto Rico of 1898—the territorial clause of the Constitution,[6] and the in-

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[3] 30 Stat. 1754 (1898).

[4] 30 Stat. 1759 (1898).

[5] ". . . ; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. art. VI.

[6] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .." U. S. Const. art. IV, § 3. However, since Puerto Rico was not an "incorporated" territory, this clause is not as logical a source of power as the Treaty of Paris. See *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

herent authority of United States national sovereignty and the power of foreign relations:

> "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed 'an act for the establishment of a territorial government in Florida'. . . ."[7]

The policies here relevant to the enactment of Section 4(e) were adopted by Congress before the Commonwealth of Puerto Rico was established in 1952, that is, while Puerto Rico was a territory subject to unilateral Congressional action under its plenary powers.

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[7] *American & Ocean Insurance Co.* v. *356 Bales of Cotton,* 26 U.S. (1 Pet.) 511, 542-543 (1828).

The Supreme Court in 1901 examined the Treaty of Paris closely in the course of determining that it did not intend to incorporate Puerto Rico into the United States. The Court stated at one point:

> "We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire'." *Downes* v. *Bidwell,* 182 U.S. 244, 279 (1901).

A recent decision of the Supreme Court of Puerto Rico characterizes the authority of Congress over the territory of Puerto Rico as stemming both from the Treaty of Paris and from the territorial clause. *RCA Communications, Inc.* v. *Government of the Capital,* —— P.R. —— (Sup. Ct. of P.R., Nov. 17, 1964).

From the beginning the United States has recognized the economic and cultural distinctiveness of Puerto Rico, and has adapted its policies accordingly. This has been feasible under the Constitution, since Puerto Rico was not incorporated into the United States like the states and most of the territories.[8] Thus, for example, Puerto Rico has always had a separate fiscal system: the United States internal revenue laws have never applied to Puerto Rico,[9] and customs receipts on imports into Puerto Rico are paid into the Puerto Rican treasury.[10] And Congress through the years delegated increasing control to Puerto Rico of its local government.[11]

In 1952 Puerto Rico achieved a full measure of local self-government through a compact mutually approved by the United States Congress and the people of Puerto Rico.[12]

The Federal Relations Act[13] continues as a matter of bilateral agreement the historic Congressional policies relevant to this case of common American

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[8] *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

[9] Act of April 12, 1900, ch. 191, §§ 3, 4, 31 Stat. 77 (1900); Organic Act of 1917, ch. 145, § 9, 39 Stat. 954 (1917); Puerto Rican Federal Relations Act, 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964).

[10] 31 Stat. 78 (1900), 48 U.S.C. § 740 (1964).

[11] Organic Act of 1917, ch. 145, 39 Stat. 951 (1917); Act of Aug. 5, 1947, ch. 490, 61 Stat. 770 (1947).

[12] 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964); P.R. Const.; 66 Stat. 327 (1952); Proclamation by the Governor of Puerto Rico, July 25, 1952.

[13] 64 Stat. 319 (1950), 48 U.S.C. §§ 731b-31e (1964). This act sets forth the basic terms of the association between the United States and Puerto Rico.

citizenship and cultural distinctiveness. Judge McGowan's dissenting opinion below is not correct to the extent that it assumes or implies that Congress retains plenary power over Puerto Rico, under the territorial clause or any other source. The establishment of the Commonwealth in 1952 inaugurated a bilateral relationship between the United States and Puerto Rico, the terms of which, set forth in the Federal Relations Act, can be altered only by mutual consent, and not by unilateral action of Congress. The Congressional enactment of Section 4(e) is supported by historic Congressional policies adopted when Puerto Rico was a territory and continued by mutual consent at the time the Commonwealth was established; the enactment did not and could not rest on the thesis of continuing Congressional plenary power over Puerto Rico.[14] This is not to say that there

[14] The change in Puerto Rican status is illustrated by United Nations action removing Puerto Rico from the rolls of the non-self-governing territories. In 1953 the United Nations, upon the initiative of the United States, adopted a resolution recognizing that, with the establishment of the Commonwealth, Puerto Rico ceased to be a colony or territory subject to the unilateral and plenary authority of the United States. The United Nations noted that Puerto Rico has "achieved a new constitutional status", that the new association between the United States and Puerto Rico "constitutes a mutually agreed association" and that the Puerto Ricans "have attained internal self-government". U.N. Gen. Ass. Res. No. 151 (8th Sess. 1953).

The United States Government detailed in various documents and statements that Puerto Rico had achieved "the full measure of self-government." Memorandum by the Gov't of the U. S., U.N. Gen. Ass. Off. Rec. 8th Sess., Com. on Infor. from Non-Self-Governing Territories, Annex II, at 1 (A/AC.35/L.121) (1953). For example, at one point United States Representative

are no residual territorial and treaty powers in Congress to implement these historic policies, at least insofar as Puerto Ricans resident in the states are concerned.

2. Congress endowed the Puerto Ricans with full American citizenship

It is of first importance in this case that, in accordance with its responsibility for "the civil rights and political status of the native inhabitants" as set out in the Treaty of Paris, Congress endowed the people of Puerto Rico with full American citizenship. In the first Organic Act of 1900, Congress recognized the people of Puerto Rico as a "body politic" and declared that residents (except those electing by a certain date to retain their Spanish citizenship) were citizens of Puerto Rico and entitled to the protection of the United States.[15] In the second Organic Act in 1917, Congress conferred United States citizenship upon the people of Puerto Rico.[16] Since that date all persons born in Puerto Rico and subject to the jurisdiction of the United States are native born American citizens with all the rights and obligations flowing therefrom.[17] This was a novel and dramatic enactment of Congress.

Frances P. Bolton stated: "The present status of Puerto Rico is that of a people with a constitution of their own adoption stemming from their own authority which only they can alter or amend. The relationships previously established also by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent." U. S. Delegation to U.N. Gen. Ass. Press Release, No. 1802 (Nov. 3, 1953).

[15] Act of April 12, 1900, ch. 191, § 7, 31 Stat. 79 (1900).

[16] Organic Act of 1917, ch. 145, § 5, 39 Stat. 953 (1917).

[17] 66 Stat. 236 (1952), 8 U.S.C. § 1402 (1964).

In one move, more than a million people outside the continental United States were given United States citizenship.

The importance of this citizenship cannot be overstated. The closeness of the United States-Puerto Rico relationship has been in no small part a result of that status, and the Puerto Ricans are deeply committed to their citizenship. Citizenship carries with it many duties and privileges, not all of which can be precisely delineated. One of the most important of the rights of citizenship is the right to move freely into and about the United States mainland. An earlier case in this Court described this:

> "It became a yearning of the Porto Ricans to be American citizens, therefore, and this act [Jones Act] gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political. A citizen of the Philippines must be naturalized before he can settle and vote in this country. . . . Not so the Porto Rican under the Organic Act of 1917."[18]

The Court used the words "civil, social and political" to characterize the rights of the Puerto Rican migrating to the United States mainland. The language points up the direct connection between the citizenship of a Puerto Rican and his consequent right to move onto the mainland and there participate in the life of his new residence on an equal footing with other resi-

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[18] *Balzac* v. *Porto Rico*, 258 U.S. 298, 308 (1922).

dents.[19] This right to "political integration" of Puerto Ricans residing in the United States was also on Congress' mind when it was considering Section 4(e). For example, Senator Javits referred to the importance of the Puerto Ricans in New York becoming a part of the community through political participation and voting.[20] Judge Kaufman in a pending case similar to the present one mentioned Congress' concern "for the Puerto Rican-American's problem in integrating his community into the political lifestream of the nation, and, in particular, the political life of New York State."[21] It is, therefore, an important concomitant of the Puerto Rican's right to move freely onto the mainland that he should be able there to participate in the political process and to vote.

There is another direct link between citizenship and voting. The Constitution is now generally interpreted to include the crucial right to choose one's rulers. As

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[19] The United States described this to the United Nations when it was considering Puerto Rican status in 1953:

> "Similarly, it should be pointed out that the people of Puerto Rico who are today citizens of the Commonwealth continue to be citizens of the United States of America, with free access to the entire country and with the right to complete freedom of movement therein. The importance of this provision can be judged by the number of Puerto Ricans now residing in the United States. These Puerto Ricans, as well as all those who will reside there in the future, become automatically incorporated into the political life of the country and have the right to vote in state and national elections simply by virtue of their residence and as prerogative of their citizenship." U. S. Delegation to the U.N. Gen. Ass. Press Release, No. 1740 (Aug. 28, 1953).

[20] 111 Cong. Rec. 10681 (daily ed. May 20, 1965).

[21] *United States* v. *County Bd. of Elections*, 248 F. Supp. 316, 320 (W.D.N.Y. 1965).

early as the 1880's national citizenship was declared by this Court to carry with it the right to vote for national officers.[22] The reapportionment cases have been the occasion of some vigorous re-analysis of the right to vote, and they affirm it as a Constitutionally protected right which belongs to every citizen of the United States:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[23]

The rational basis for the Congress' concern to ensure the voting rights of Puerto Ricans who have taken up residence on the mainland is thus fortified by the judicial recognition of voting protections inherent in the Constitution and particularly the Fourteenth Amendment. In undertaking to grant full citizenship to the Puerto Rican people almost fifty years ago, Congress embarked on a policy which, as reaffirmed in the compact of 1952, both authorizes and obligates Congress to ensure that whatever constitutional rights flow from that citizenship are not infringed.

3. Congress encouraged the continued dominance of the Spanish language in Puerto Rico

The language difference at the heart of this case is a vivid example of the imaginative and enlightened approach which Congress has taken toward the people of Puerto Rico. The United States has encouraged di-

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[22] *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[23] *Reynolds* v. *Sims*, 377 U.S. 533, 554-55 (1964).

versity in many ways, and has enjoyed the richness and strength that can come therefrom. In the case of the Puerto Ricans, Congress has included within the ranks of its full citizens an island of people differing in many ways from the United States, and has encouraged the continuation of their own culture: a cosmopolitan citizenship. The domination of the Spanish language in Puerto Rico has been one result.

After the failure of early attempts to make English the language of instruction in the school system in Puerto Rico, Congress has never exerted its powers to substitute English as the common language in Puerto Rico, in contrast to American experience in other areas under its jurisdiction.[24] The imposition of English in the school system had a downhill history, in the face of the strong Spanish tradition. From 1903 to 1916 English was the language used in the schools, under policies adopted by the Presidentially-appointed Commissioner of Education. From 1916 to 1949 Spanish was increasingly used. Since 1949 Spanish has been the language of instruction in all grades through high school.[25] From 1949 to 1952 the Commissioner of Education was locally chosen under authorizing legislation of Congress.[26] In 1952 the establishment of the Commonwealth put educational matters, as an internal affair, entirely into the hands of the Commonwealth government.[27] At no time in authorizing educational

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[24] See, *e.g.*, Act of June 16, 1906, ch. 3335, § 3 Fifth, 34 Stat. 271 (1906) (Oklahoma Enabling Act); Act of Feb. 20, 1811, 2 Stat. 641 (1811) (Louisiana Enabling Act).

[25] Osuna, A History of Education in Puerto Rico, 342-414 (1949).

[26] Act of Aug. 5, 1947, ch. 490, § 3, 61 Stat. 771 (1947).

[27] See authorities cited note 12 *supra*.

grants to Puerto Rico has Congress attempted to tie them into the use of English.[28]

That Spanish has continued to be the dominant language of the Puerto Ricans, and even the public schools have entirely reverted to using it, is thus the direct result of these policies of the Congress. Congress could at any time before 1952 have compelled use or knowledge of English. The continued use of Spanish in Puerto Rico, coupled with the Congressional policy of full American citizenship and with the recent migration of Puerto Ricans to New York, has produced the constitutional distortion of a large group of American citizens barred from voting in the place they have chosen as a residence.

B. The Purpose of Section 4(e)

The purpose of Congress and the considerations which guided it in the enactment of Section 4(e) are unusually clear. The provision originated as an amendment to the Federal Voting Rights Act of 1965. The amendment was proposed by the senators and two of the congressmen from New York[29] with emphasis on three things: (1) Many United States citizens from Puerto Rico were being deprived by the New York English literacy test of the opportunity to vote; (2) the amendment was aimed expressly at the thousands of United States citizens educated in Puerto Rican

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[28] See, *e.g.*, National Defense Education Act, 72 Stat. 1581 (1958), as amended, 20 U.S.C. §§ 401 *et seq.* (1964); 79 Stat. 27 (1965), 20 U.S.C.A. §§ 236 *et seq.* (Supp. 1965).

The English language, it should be noted, has for many years been taught in the Puerto Rican schools and in many areas is spoken concurrently with Spanish, particularly where the federal interchange is important. But the common mother tongue has remained Spanish.

[29] Senators Javits and Kennedy, 111 Cong. Rec. 10643 (daily ed. May 19, 1965); Representatives Ryan and Gilbert, *id.* at 15101, 15665 (daily ed. July 6, 9, 1965).

schools who were disqualified from voting in mainland elections because they were literate in Spanish rather than in English; and (3) it was Congressional policy that the primary language of the Puerto Ricans had continued to be Spanish and not English. The proponents also emphasized the high educational standards of the Puerto Rican schools (the literacy rate in Puerto Rico is 83%,[30] and the Commonwealth is now devoting over one-third of its annual budget to education),[31] and the availability of New York of Spanish language newspapers, radio and other informational media.[32] Congress was careful to write a remedial

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[30] U.S. Dept. of Commerce, Bureau of the Census (1960), R. 75.

[31] Commonwealth of P.R., Budget for Fiscal Year 1967, § 21, p. 1.

[32] 111 Cong. Rec. 10675-10689 (daily ed. May 20, 1965); 111 Cong. Rec. 15101-15102, 15665-15668 (daily ed. July 6, 9, 1965). "Let me describe the case of the typical New Yorker of Puerto Rican origin. By virtue of the accident of his birth he is educated in Puerto Rico in schools conducted mainly in Spanish. In school he reads, in Spanish, the same textbooks which his fellow citizen on the mainland reads in English. That his schooling takes place in Spanish is not up to him, but is due to the fact that the U.S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico, to make Puerto Rico a showcase for all of Latin America. His education completed, he decides to exercise his constitutional right to move to another part of the United States, to the State of New York.

"New York says to him: 'It does not matter to us that you are a natural-born citizen of the United States. It does not matter that you are literate in Spanish, that you have been educated in civics and government in your school in Puerto Rico. It does not matter that you read a Spanish-language newspaper in New York which carries most of the major syndicated American political columnists, that you listen to Spanish-language programs of news and information on the radio and television. You cannot vote in our State unless you speak English, and we will not allow you to show your education as evidence of literacy even though we do allow your English-speaking brother to show his education in place of taking the literacy test.'" Senator Kennedy, 111 Cong. Rec. 10675 (daily ed. May 20, 1965).

provision that overrides only part of the New York voting qualifications and leaves a basic literacy requirement operating as a state criterion for voting eligibility; only those non-English speaking residents who have completed a sixth grade level of education are enfranchised by the federal statute.[33]

C. The Fourteenth Amendment Authorizes the Legislation

One of the vital functions of the Fourteenth Amendment is its protection against discriminatory voting practices. Of course, the states may establish the qualifications of the voters in the elections held within their boundaries; it is also agreed by all that the Fourteenth Amendment limits that right to the establishment of fair and reasonable criteria.[34] States may not arbitrarily deprive their residents of the vital right to political choice, and the courts have invalidated state discriminations against groups of potential voters. The recent example of this is the decision of this Court in *Carrington* v. *Rash*, 380 U.S. 89 (1965), holding that a state's denial of the vote to resident members of the armed services was incompatible with the equal protection clause of the Fourteenth Amendment. The Court emphasized: "We deal here with matters close to the core of our constitutional system."[35] Similar cases include the exclusion of Negroes from primaries (*Nixon* v. *Herndon*, 273 U.S. 536 (1927)), and unfair districting (*Reynolds* v. *Sims*, 377 U.S. 533 (1964)).

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[33] Section 4(e)(2), 79 Stat. 439 (1965). Congress also carefully left authority for the states to condition the right to vote on a higher level of education by providing in that section that where state law uses a different level of education as a presumption of literacy, that level shall be the criterion for the American-flag school test.

[34] *E.g.*, *Drueding* v. *Devlin*, 380 U.S. 125 (1965), *affirming* 234 F. Supp. 721 (D. Md. 1964).

[35] 380 U.S. at 96.

The New York language test is thus very likely in conflict with the Fourteenth Amendment in itself. But the legislation in the present case stands on an even clearer footing, since specific Congressional judgment has intervened as provided in Section 5 of the Fourteenth Amendment. Congress has evaluated the situation and deliberately articulated the judgment that the state laws are in conflict with the amendment. The case is all the more impressive since Congress left to the state its literacy criterion, carefully nullifying only the sections of the laws which barred from voting all non-English speaking Puerto Ricans, even if educated and literate in Spanish.[36]

The scope of the "appropriate legislation" clause of the Fourteenth Amendment is something less than clear, but there is no doubt that it does add a measure of legislative authority. Congressional judgment expressly based on that clause is to be respected, and this is particularly true when Congress, as we described above, is acting within provinces peculiarly under its authority. As this Court stated in *Ex parte Virginia*, "... the power of Congress ... has been enlarged .... Some legislation is contemplated to make the Amendments fully effective."[37] The Fourteenth Amendment

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[36] This point is particularly relevant in view of *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959), which held that a state literacy test does not per se violate the Fourteenth Amendment. That decision does not, of course, constitute a basis for the conclusion that (1) such tests in some circumstances may not be arbitrary in their effect, and hence invalid, or (2) that Congress, acting under the legislative implementation provision of the Fourteenth Amendment, may not provide a substitute literacy test in circumstances where Congress found literacy tests having a widespread and arbitrary effect.

[37] 100 U.S. 339, 345 (1880).

guidelines are broad and the courts have upheld the power of Congress to protect and define them carefully and creatively.[38] When, as here, Congress is trying to secure a fundamental constitutional protection, it necessarily moves with some latitude of judgment.[39] Judge Kaufman enunciated this in the sister case of *United States* v. *County Bd. of Elections:*

> "Inherent in its power to enforce the Fourteenth Amendment, Congress must be considered as having some latitude to determine for itself what patterns of activity contravene Fourteenth Amendment rights. Whether any particular form of state action is prohibited by the Amendment depends upon an assessment of many factors . . . . At the very least, in a case such as presented to us, where Congress has adopted and fostered policies which would be frustrated by conflicting state action, Congress has responsibility for exercising judgment as to when the Fourteenth Amendment is violated and the power, in appropriate cases, to eliminate the violation."[40]

D. Congress Enacted Section 4(e) in Implementation of Policies in an Area of Its Special Competence

Because Congress was here enacting legislation in an area of special Congressional responsibility and historical policies as described in Section A, *supra,* its judgment against conflicting state laws is entitled to

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[38] *E.g., Gibson* v. *Mississippi,* 162 U.S. 565 (1896) (dictum); *Strauder* v. *West Virginia,* 100 U.S. 303, 311 (1880).

[39] See *Ex parte Virginia,* 100 U.S. 339, 346 (1880); *cf. United States* v. *Gainey,* 380 U.S. 63, 67 (1965); *South Carolina* v. *Katzenbach,* 34 U.S. L. Wk. 4207 (U.S. March 7, 1966).

[40] 248 F. Supp. 316, 322 (W.D.N.Y. 1965). Moreover, the Supreme Court has on occasion substituted a Congressional constitutional judgment for its own previously conflicting one. *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962).

even more than the usual wide measure of respect and presumption of constitutionality. By virtue of its powers under the Treaty of Paris, Congress over the course of half a century has evolved a highly successful and creative relationship with Puerto Rico, perpetuated in 1952 in the bilateral compact establishing the Commonwealth. An important part and strength of that relationship has been the encouragement of the Puerto Rican culture and language within a framework of full American citizenship. Congress has now determined that state literacy voting tests which bar literate Puerto Rican citizens conflict with the constitutional rights of those Puerto Ricans. The nature and extent of Congressional power over Puerto Rico has changed since 1952, but the Congressional policies established up to that time, and embodied in the compact, lend a particular sanction and support to Congressional efforts to implement Fourteenth Amendment rights here. This is especially true because those rights flow from the grant of United States citizenship which is basic to the United States-Puerto Rico association; and these are rights which follow the Puerto Rican even as he moves outside the Commonwealth.

Congressional enactments pursuant to express treaty obligations are the dominant law of the land and, of course, supersede conflicting state provisions.[41] Similarly, to the extent that the historic Congressional powers over Puerto Rico derived from the territorial clause and inherent powers of national sovereignty, these too are paramount. In speaking of another exclusive federal power, immigration, this Court has recognized this quality of the Fourteenth Amendment,

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[41] See U.S. Const. art. VI, note 5 *supra; Missouri* v. *Holland*, 252 U.S. 416 (1920).

even without implementing legislation. In *Truax* v. *Raich,* 239 U.S. 33 (1915), the court invalidated a state statute discriminating against the employment of aliens. The case is of special interest here, since the federal policies set forth under the exclusive federal power, immigration, were found to carry over to protect the alien from discrimination within a particular state, just as Congressional policies established over the years give special force to the Congressional judgment here in question in Section 4(e).

CONCLUSION

In the circumstances presented in this case, Section 4(e) of the Federal Voting Rights Act of 1965 is a valid exercise of Congressional power under the Fourteenth Amendment and supersedes the conflicting portions of the laws of New York. The judgment of the District Court should be reversed.

Respectfully submitted,

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March 11, 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 847

NICHOLAS deB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, AND THE UNITED STATES, APPELLANTS

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (R. 79) is reported at 247 F. Supp. 196.

JURISDICTION

The judgment of the three-judge district court was entered on December 7, 1965 (R. 102).[1] Notices of appeal were filed in the district court on December 13 and 20, 1965 (R. 104, 108). Jurisdictional statements

[1] On December 21, 1965, the district court granted a stay of its injunction pending this appeal on condition that the New York City Board of Elections maintain a separate list of persons registered by reason of the operation of Section 4(e) of the Voting Rights Act of 1965 (R. 109). The condition having been accepted, Section 4(e) remains operative in New York City pending the decision here.

were filed here on December 23, 1965 and January 5, 1966, and probable jurisdiction was noted on January 24, 1966 (R. 110). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253. *Katzenbach* v. *McClung*, 379 U.S. 294.

QUESTION PRESENTED

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional insofar as it prohibits the States from denying the right to vote to otherwise qualified Puerto Rican residents who are literate in Spanish, on account of their inability to read and write English.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, clause 2, of the United States Constitution:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

2. Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

> SECTION 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 4(e) of the Voting Rights Act of August 6, 1965, P.L. 89-110, 79 Stat. 437, 439:

> (e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

4. Article II, Section 1, of the New York Constitution (in pertinent part):

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to

vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

Section 150, McKinney's Consolidated Laws of New York Ann., Election Law (in pertinent part):

* * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A "new voter," within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.

5. Section 168, McKinney's Consolidated Laws of New York Ann., Election Law (in pertinent part):

1. The board of regents of the State of New York shall make provisions for the giving of literacy tests.

* * * * *

2. * * * But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private

school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance. But the genuineness of the certificate and the identity of the voter shall remain questions of fact to be established to the satisfaction of the election inspectors and subject to challenge, like any other fact relating to the qualification of a voter.

If, however, such certificate, diploma, matriculation card or letter of certification cannot be produced, the appropriate board shall register the applicant upon the execution of an affidavit in substantially the following form: [affidavit form omitted; 1965 Cum. Pocket Part].

STATEMENT

On August 6, 1965, the President of the United States signed into law the Voting Rights Act of 1965. On the same day, appellees, a husband and wife who are registered voters in Kings County, New York, filed their complaint in the district court seeking to enjoin the Attorney General from enforcing the provisions of Section 4(e) of the Act (R. 1).[2]

[2] The complaint was filed in the United States District Court for the District of Columbia in accordance with Section 14(b) of the Voting Rights Act of 1965 (P.L. 89-110, 79 Stat. 445), which provides that "[n]o court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue * * * any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act * * *."

On September 8, 1965, plaintiffs were granted leave to file an amended complaint and to add as parties the New York City Board of Elections and its members (R. 11).

The amended complaint alleged that approximately fifty percent of the 700,000 migrants from Puerto Rico now living in New York City read and write only the Spanish language and many of these Spanish-speaking residents live in Kings County, New York, where plaintiffs are registered voters; that large numbers of Spanish-speaking persons who are unfamiliar with the English language would be entitled to vote in New York City and Kings County by operation of Section 4(e) of the Voting Rights Act of 1965 despite their inability to qualify under the English literacy requirements of New York law; that such persons would be unfamiliar with the information available on political issues in New York City, most of which is published in the English language, and that the exercise of the franchise by such persons will dilute the effect of plaintiffs' vote; that the New York City Board of Elections had announced its intention to comply with Section 4(e) and was actually registering persons unable to read and write English; and that the enactment of Section 4(e) is not authorized by the Fourteenth Amendment and therefore its enforcement deprives plaintiffs of their rights secured under the Fifth and Ninth Amendments to the Constitution (R. 13–16). The prayer was for a declaratory judgment declaring Section 4(e) unconstitutional and an injunction prohibiting the Attorney General and the New York City

Board of Elections from enforcing or complying with Section 4(e) (R. 16).

On September 20, 1965, the United States was granted leave to intervene as a defendant (R. 28),[3] and on September 21, 1965, a three-judge court was designated (R. 29). In their joint answer, the defendants Katzenbach and the United States admitted that Section 4(e) is in direct conflict with the English literacy requirement of the New York Election Law; that many Spanish-speaking persons not literate in English who live in Kings County would be qualified to vote by reason of Section 4(e); and that the Attorney General had taken action to enforce Section 4(e) (R. 37–39). All the defendants admitted that the New York City Board of Elections was actively registering persons under the provisions of Section 4(e) R. 35, 38).

On October 18, 1965, the case was argued and submitted for decision on cross-motions for summary judgment without the taking of oral testimony.

On November 15, 1965, the district court announced its decision that Section 4(e) is unconstitutional, Circuit Judge McGowan dissenting.[4] The court ruled that the plaintiffs had standing to correct any dilution of their vote accomplished by the registration and

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[3] The United States is authorized by statute to intervene as a party in any action "wherein the consitutionality of any Act of Congress affecting the public interest is drawn in question." 28 U.S.C. 2403.

[4] An order declaring Section 4(e) unconstitutional and enjoining the Attorney General and the New York City Board of Elections from enforcing or complying with Section 4(e) was entered on December 7, 1965 (R. 102).

voting of persons "not legally entitled to vote" (R. 89). The majority opinion goes on to state that "the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate" (R. 84). The court reached this conclusion on the theory that "the right to vote is not a privilege derived from the United States, but is conferred by the State" (R. 85), and that only by constitutional amendment could limitations be imposed on the power of the States to prescribe voter qualifications. It cited the Fifteenth, Nineteenth, and Twenty-Fourth Amendments as establishing that "whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment" (R. 88). The opinion notes that, until passage of the Voting Rights Act of 1965, "it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment" (R. 88). This Court's decision in *Lassiter* v. *Northampton Board of Elections*, 360 U.S. 45, was invoked as foreclosing the argument that New York's English literary requirement as applied to migrants from Puerto Rico violates the Equal Protection Clause (R. 89). And, finally, the court rejected the contention that the territorial power conferred on Congress by Article IV, Section 3, of the Constitution authorizes the enactment of Section 4(e)—noting that Section 4(e) "is neither limited nor directed solely to Puerto Ricans" and adding that, in any event, "the power

of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States" (R. 90).

In dissent, Judge McGowan expressed his view that the Territorial Clause supports Section 4(e) insofar as it is challenged in this case, noting that "the complaint which plaintiffs make about Section 4(e) is confined to allegedly illegal voting by Puerto Ricans" (R. 93). He concluded that the territorial power comprehends "laws relating to the status and rights of the people who inhabit those territories and prescribing that such status and rights are to be recognized throughout the United States as well as in the territory itself" (R. 94). Judge McGowan referred to the evolving congressional policy of complete internal independence for Puerto Rico and equal status as American citizens for natives of Puerto Rico, and observed that Section 4(e) is a corollary to the congressional decision to permit Puerto Rico's Latin culture and Spanish language to prosper without mainland interference to the extent desired by the Puerto Ricans themselves (R. 95). An integral aspect of this policy has been the tolerance of the use of Spanish as the language of instruction in the public schools (R. 97–98). Against that background, Judge McGowan concluded that "[a]ssuring our Puerto Rican citizens a right to vote under the circumstances disclosed in this record could rationally have been deemed by Congress to be" included among the "relevant objects of national concern in our relationships with our territories" (R. 102).

210-107—66——2

ARGUMENT

INTRODUCTION AND SUMMARY

We consider Section 4(e) of the Voting Rights Act of 1965 only insofar as it requires the States to admit to the vote otherwise qualified and literate American citizens educated in Spanish in Puerto Rico, notwithstanding their inability to read or write English. To be sure, the provision, in terms, sweeps more broadly—encompassing every "person" educated in any "American-flag" school in "any State or territory" where the classes were conducted in any language "other than English" (*supra*, p. 3). But there is no present occasion to examine other possible applications. Not only is the case before the Court confined to Puerto Rican residents of the continental United States, but no different controversy has arisen under Section 4(e).[8] Nor are there likely to be other applications of the provision; so far as we are aware, there are today no American flag elementary schools teaching primarily in a foreign language outside Puerto Rico.[9]

[8] The only other controversy that has reached the courts is *United States* v. *County Board of Elections of Monroe County, N.Y.*, 248 F. Supp. 316 (W.D. N.Y.), appeal pending, No. 1040, this Term—also a case involving the application of Section 4(e) to Puerto Ricans in New York State.

[9] At least, there appear to be no public or parochial schools of that character. The only partial exceptions, so far as we are advised, are one primary school near the Mexican border in Texas and one in Florida which conduct classes in both English and Spanish in the lowest grades, and a group of parochial schools in the New England States where French is the language of instruction in various minor subjects. We understand, however, that in none of these schools is the foreign language the "predominant" language of instruction and that the graduates of such schools in fact achieve substantial literacy

In any event, the legislative history of Section 4(e) is plain that Congress was focusing exclusively on the situation of Puerto Ricans on the mainland—primarily in New York City—and would have enacted the provision to remedy their problem alone, without regard to other beneficiaries of the legislation, if there be any. There is here no obstacle comparable to that encountered in the effort to sustain the Civil Rights Act of 1875 as applied only to public conveyances engaged in interstate commerce or operating within an area where the federal power is plenary. See *Civil Rights Cases*, 109 U.S. 3, 19; *Butts* v. *Merchants Transp'n Co.*, 230 U.S. 126. Compare, also, *Trade-Mark Cases*, 100 U.S. 82, 96-99. At the least, the application of the statute to Puerto Ricans presents a severable question.[1] Accordingly, the Court is free to pass on the constitutionality of Section 4(e) as applied to Puerto Rican residents of the United States without, at the same time, resolving all other hypothetical cases.

Thus narrowed to a special situation, the statute in suit does not raise far-reaching questions concern-

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in English. We put to one side special schools catering to the children of foreign diplomats and other schools, if any, attended primarily by aliens; as a practical matter, Section 4(e) applies only to American citizens, since citizenship is a prerequisite to voting in all 50 States.

[1] The Voting Rights Act, of which Section 4(e) is a part, contains the following express severability clause (§ 19):

> If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

ing the power of the national legislature generally to fix voting qualifications, nor even the more limited inquiry whether Congress may implement the Equal Protection Clause (or the Privileges and Immunities Clause) of the Fourteenth Amendment by exempting citizens from discrimination in the exercise of the right to vote on account of their native language or—what often amounts to the same thing—on account of their national origin. In our view, the present case may be resolved on a much narrower basis, in light of the special relationship between the federal government and Puerto Rico, the unique circumstances applicable to Puerto Ricans in the continental United States, and the particular responsibilities of the Congress with respect to these citizens. Accordingly, we turn briefly to an examination of the background against which Section 4(e) was enacted.

We have set out at some length in an appendix (*infra*, pp. 49–64) the history of the relations between Puerto Rico and the continental United States, with particular emphasis of the language of instruction on the island during the last half century (*infra*, pp. 55–61) and the migration of Puerto Ricans to the mainland (*infra*, pp. 62–64). The most immediately revelant facts that emerge from that survey are these:

First, notwithstanding a consistent policy of granting increased autonomy to Puerto Rico, from the date of its acquisition in 1898 by the Treaty of Paris, 30 Stat. 1754, 1759—which expressly provided that "[t]he civil rights and political status of the native inhabitants * * * shall be determined by the Congress"—until 1952, governance of the island and the status of its residents have been subject to the

plenary power of Congress to "make all needful Rules and Regulations respecting the territory * * * belonging to the United States" (U.S. Constitution, Art. IV, Sec. 3, cl. 2; see *Downes* v. *Bidwell*, 182 U.S. 244; *Balzac* v. *Porto Rico*, 258 U.S. 298), and all that was done during that half-century with respect to Puerto Rico and its inhabitants, including the eventual achievement of commonwealth status, is ultimately attributable to the Congress.

Second, by the Jones Act of 1917, 39 Stat. 951, 953, the Congress conferred United States citizenship upon Puerto Ricans, thereby facilitating their uninhibited migration to the mainland; and they have, in fact, come here in large numbers since 1946 (averaging over 41,000 annually for the decade 1951–1960), so that there are today almost a million Puerto Ricans residing in the continental United States, about three-quarters of them concentrated in New York City.

Third, after the failure of early attempts to impose English on the inhabitants of the island, and despite continuing efforts to introduce English as a second language, the government of the United States in practice permitted teaching in Spanish through the fourth grade from 1916 on (with only a very brief partial exception), and, beginning in 1946, altogether abandoned English as the language of instruction in public schools—a policy which was consciously made irreversible, for practical purposes, in 1947 when Congress amended the Organic Act to permit the appointment of the Commissioner of Education by a popularly elected governor and again confirmed upon congres-

sional agreement to commonwealth status for Puerto Rico in 1952; the consequence is that, today—although the rate of literacy in Spanish is very high (more than 83%) [8]—almost two-thirds of the Puerto Rican population is unable to speak English,[9] much less read and write that language.

It was against this background that Congress, in 1965, enacted Section 4(e). The sponsors of the legislation—all New Yorkers (Senators Kennedy and Javits [10] and Representatives Ryan and Gilbert) [11]—stressed the congressional responsibility for the migration of Puerto Ricans to the American mainland and for their language handicap, and consequent disfranchisement in English-literacy States like New York. Thus, Representative Ryan thought it "unjust" that Puerto Rican citizens educated in Spanish should be barred from voting here when "we encourage migration between the island and the mainland." [12] Representative Gilbert termed it "an anomaly" that the Congress should "encourage the perpetuation of Puerto Rico's Spanish language and at the same time do nothing to protect the rights of citizenship of Puerto Ricans who move to other sections of the country." [13]

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[8] The literacy rate in Puerto Rico in 1960 was 83%. See R. 75. In light of the fact that the Commonwealth has recently expended one-third of its annual budget on education, it may be assumed that the literacy rate is now somewhat higher.

[9] See R. 75.

[10] See 111 Cong. Rec. 10643 (daily ed., May 19, 1965).

[11] See *id.*, at 15101 (July 6, 1965); *id.*, at 15665 (July 9, 1965).

[12] *Id.*, at 15667.

[13] *Id.*, at 15666. See, also, Congressman Gilbert's statement, Hearings on Voting Rights before Subcommittee No. 5 of the House Judiciary Committee, 89th Cong., 1st Sess., 362 (1965).

Senator Javits spoke in like vein, emphasizing the rightful "sense of injustice on the part of those in Puerto Rico who were educated in American flag schools" under a federal policy which "allows the instruction there to be in Spanish."[14] Perhaps Senator Kennedy summed up the congressional mind when he exhorted his colleagues to discharge their "responsibility and obligation" toward people who had come here because Congress had made them citizens, with a free right of entry to every State, yet with a language handicap that "is partly the result of a policy that we ourselves have fostered in Congress."[15]

The national legislature did not act precipitantly. As we have noted, the Puerto Rican migration to the continental United States—particularly New York State—has been substantial since the mid-1940's.[16] Congress abstained for two decades and intervened only after New York declined[17] to follow the example of other States with substantial multilingual populations—among them Louisiana, New Mexico, and Hawaii[18]—and after judicial proceedings had failed to

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[14] *Id.*, at 10680.

[15] *Id.*, at 10688. See, also, Senator Kennedy's statement at *id.*, 10675.

[16] See App., *infra*, p. 62; R. 72.

[17] At least three proposals to amend the New York Constitution so as to permit voting by persons literate in Spanish were submitted to the State legislature in 1962. See Assembly Bills Nos. 121, 849 and 875, introduced at the session of the New York legislature beginning January 3, 1962.

[18] See *infra*, pp. 45–46.

achieve the franchise for Spanish-speaking Puerto Ricans."[19]

Nor did the Congress act intemperately or capriciously, legislating an unduly radical solution without regard to established local qualification procedures or the prerogative of the States to insist on an informed electorate. To be sure, Section 4(e) qualifies the English literacy requirement of a few States.[20] But the local decision to demand literacy is fully respected and every effort is made to reduce the impingement to the minimum. Moreover (as in this case), the law affects for the most part Spanish-speaking residents of New York City who have all the means of obtaining relevant information about electoral issues and candidates.[21] The federal legislation imposes no undue burden on the State electoral machinery. It does not require the formulation and administration of a Spanish literacy test. On the contrary, the States are

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[19] See *Camacho* v. *Doe*, 31 Misc. 2d 692, affirmed, 7 N.Y. 2d 783; *Camacho* v. *Rogers*, 199 F. Supp. 155 (S.D. N.Y.); *Cardona* v. *Power*, 16 N.Y. 2d 827, probable jurisdiction noted January 24, 1966, No. 673, this Term.

[20] The States requiring proof of literacy in English, expressly or by implication, are: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii (alternative to literacy in Hawaiian), Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, South Carolina (alternative to property qualification), Washington, Wyoming, and perhaps Virginia. The requirement is temporarily suspended in Alabama, Georgia, Mississippi, South Carolina and most of North Carolina by force of Section 4(a) of the Voting Rights Act of 1965, sustained in *South Carolina* v. *Katzenbach*, No. 22, Original, this Term, decided March 7, 1966. Of all the States affected, only four (New York, California, Connecticut and Massachusetts) have a Puerto Rican population exceeding 5,000. See R. 72.

[21] See *infra*, p. 44.

required to admit to the vote only those who have successfully completed six grades of school—remaining free to reject others who may have achieved literacy in their mother tongue without the benefit of formal schooling for the required period. In this respect, Section 4(e) accommodates itself to the voting registration procedures of New York, the most directly affected State.

In sum, Congress has acted out of a sense of moral obligation, only after long restraint, and the means ultimately chosen consciously avoid any unnecessary offense to State policy or dislocation of local procedures. The reasonableness of the solution is not seriously debatable. The only real question is whether the Congress wholly lacked constitutional power to provide any remedy in the circumstances. We submit the Constitution fully authorizes the legislation in suit.

We begin with the settled rule, enunciated by Chief Justice Marshall, a century and a half ago, that the constitutional powers of the national Congress are not "to be contracted by construction, into the narrowest possible compass" through "refined and metaphysical reasoning" that would render them "totally unfit for use" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 222), and the corollary, that authority for congressional action may properly be sought in the Constitution as a whole, or in the combined force of several provisions, not alone in one or another of the specific grants of power. Perhaps the most explicit statement of this principle is in the *Legal Tender Cases*, 12 Wall. 457, 534:

> * * * it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. * * *

We do not, of course, suggest that such an approach is equally appropriate in testing the legitimacy of every federal legislative act. Doubtless, when legislation impinges on fundamental personal rights power should not be lighly inferred in the absence of an express grant—especially if the right involved is itself protected by a specific provision of the Constitution. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U.S. 301. The rule is wholly applicable, however, when, as here, the only question is whether a seemingly necessary congressional remedy to a national problem trespasses on the prerogatives of another branch of government or those of the States. Specifically, a broad reading of the Constitution has been indulged with respect to federal legislation protecting the right of citizens to vote. See *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Gale*, 109 U.S. 65; *Ex parte Yarbrough*, 110 U.S. 651, 665; *Burroughs and Cannon* v. *United States*, 290 U.S. 534; see *Smiley* v. *Holm*, 285 U.S. 355, 366-367; *United States* v. *Classic*, 313 U.S. 299, 315. And the Court has accorded like treatment to those measures in which Congress was attempting

to fulfill its responsibilities toward its wards, whether natives of this continent or the inhabitants of our newly acquired possessions. See *United States* v. *Kagama*, 118 U.S. 375; *De Lima* v. *Bidwell*, 182 U.S. 1; *Downes* v. *Bidwell*, 182 U.S. 244; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 317. Thus, here, in sustaining legislation which—far from abridging the fundamental liberties of the people—seeks to facilitate the exercise of the franchise by former wards of the Congress, we are fully authorized to invoke a benevolent construction of the Constitution and freely to draw from several provisions as complementary sources of power.

But, there is, in fact, little occasion to stray beyond familiar boundaries. Indeed, at least two express provisions rather plainly authorize the legislation in suit. We consider first the so-called "Territorial Clause" of the original Constitution (Art. IV, Sec. 3, cl. 2), which empowers the Congress to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." It must be read together with the explicit stipulation of the treaty of cession that "the civil rights and political status" of Puerto Ricans should "be determined by the Congress." Whatever the force of those provisions with respect to the Commonwealth of Puerto Rico today, they were, after all, the predicate for the congressional policy which both permitted Puerto Ricans to retain their language and to freely migrate to the mainland as citizens, and we submit they yet authorize Congress to "wind up" the matter by providing a remedy for the resulting problem in some of the States.

Perhaps the Territorial Clause and the power to implement treaty obligations supply a sufficient basis for Section 4(e). Yet, it seems proper, also, to invoke—as did the draftsmen of the legislation—the Fifth Section of the Fourteenth Amendment, empowering the Congress to "enforce" by any "appropriate" means, the "privileges and immunities" of American citizens, the guarantee against arbitrary legislation that abridges "liberty" without "due process of law," and the right to "equal protection of the laws". It is, of course, too late to question the proposition that the Fourteenth Amendment qualifies the prerogative of the States to fix qualifications for voting in their own elections. The principle we assert here is that the Fifth Section of the Amendment authorizes the Congress to search out and remove unreasonable restrictions on the exercise of the franchise—at least for the benefit of American citizens to whom it owes a special obligation—and that its determination is entitled to deference, notwithstanding the courts might have hesitated to strike down the State barrier in the absence of the federal legislative finding.

Finally (although, as we have said, the point requires little argument once the existence of relevant power is established), we consider the objection that Section 4(e) constitutes an unreasonable intrusion on the State prerogative to fix voting qualifications and to conduct its own elections as it chooses.

We turn now to a more detailed examination of the sources of power and their relevance to the question presented. For convenience, we treat them sepa-

rately. But, at the outset, we stress once again our belief that the several constitutional provisions invoked should be viewed, in this context, as complementary predicates for the challenged legislation.

I. SECTION 4(E) IS APPROPRIATE LEGISLATION UNDER THE CONGRESSIONAL POWER TO IMPLEMENT THE TERRITORIAL CLAUSE AND THE TREATY OBLIGATIONS OF THE UNITED STATES

We have already sketched the evolving congressional policy toward Puerto Rico: United States citizenship was granted its inhabitants—carrying with it the privileges appertaining to that status, including the right to freely enter and establish residence in the several States; yet, Puerto Ricans were permitted to retain their Spanish culture and to educate their children in that language, and that decision was confirmed when the island was accorded a large measure of political autonomy, including the right to conduct its school system as it chooses. There can be no question of the power of the Congress to have determined these matters as it did. As Chief Justice Marshall suggested, at an early date, the authority to legislate for a new territory is both inherent—"the inevitable consequence of the right to acquire territory"—and expressly confirmed by the clause of Article IV, Section 3, of the Constitution which provides that "Congress shall have power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542–543. See, also *De Lima* v. *Bidwell*, 182 U.S. 1, 196. The power has been called "plenary" (*Hornbuckle* v.

Toombs, 18 Wal. 648, 655), "full and complete" (*National Bank* v. *County of Yankton*, 101 U.S. 129, 133), "well-night absolute" (*Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 347) ; but, whatever its limitations, it was plainly sufficient to support the policies we have recited. There is, of course, no doubt concerning the status of Puerto Rico as a "territory" within the Territorial Clause during the period involved. See *De Lima* v. *Bidwell, supra; Downes* v. *Bidwell*, 182 U.S. 244; *Balzac* v. *Porto Rico*, 258 U.S. 298. See, also, *Kopel* v. *Bingham*, 211 U.S. 468. Moreover, with respect to Puerto Rico, the Congress possessed, if need be, an additional source of power by virtue of the treaty of cession which explicitly provided that the "civil rights and political status of the native inhabitants * * * shall be determined by Congress." Treaty of Paris (1898), Art. IX, 30 Stat. 1759.[22] No one can be heard to complain that the provision was later implemented by granting citizenship to the residents of the territory. See *Downes* v. *Bidwell, supra*, at 279–280; *Balzac* v. *Puerto Rico, supra*, at 307–308. The only question here is whether Congress is now powerless to effectuate its policy with respect to Puerto Ricans who have come to the mainland by providing a shield against hostile State laws.

[22] See, also, Article 55 of the United Nations Charter, ratified by Congress (59 Stat. 1045–1046), which provides that the subscribing nations "shall promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and Article 56 (*id.* at 1046), which binds the signatory nations to take action "in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In our view, the answer is plain: unless the Constitution absolutely forbids it, Congress may do whatever is "necessary and proper for carrying into Execution" (U.S. Constitution, Art. I, Sec. 8, cl. 18) its legitimate policy with respect to Puerto Rico and its citizens, invoking the very sources of power which authorized the decisions already taken. As we have already noted, Section 4(e) of the Voting Rights Act of 1965 is an attempt to discharge a continuing obligation toward our Puerto Rican citizens established on the mainland by insuring that the preservation of their Spanish cultural heritage and language—which Congress itself imposed during its stewardship of the territory—does not become a serious legal handicap. That is a wholly proper concern. As this Court said in sustaining special legislation for the benefit of the Philippines, the power to govern a possession "carries with it great obligations * * *. Among these correlative duties is the moral obligation to protect, defend, and provide for the general welfare of the inhabitants." *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 314. There money was appropriated, but, certainly, the duty can be no less, nor the power more doubtful, when the purpose of the legislation is to assure equal access to the franchise. Indeed, this Court has noted that citizenship was granted the inhabitants of Puerto Rico in part "to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights." *Balzac* v. *Porto Rico,* 258 U.S. 298, 311. Thus, we submit that Section 4(e), enacted as it was to imple-

ment that promise, is fully authorized by the Territorial Clause and the power to implement treaty obligations."

What answer can be made? Only three possible objections come to mind.[23] The first—articulated by the majority below (R. 90)—is the proposition that the Territorial Clause authorizes only legislation which expends itself within the boundaries of the territory concerned. Another like contention might be that the congressional power under that provision ended when Puerto Rico ceased to be a "dependent" territory and achieved commonwealth status. And, finally, it will doubtless be argued that, whatever the extent of the present applicability of the Territorial Clause to Puerto Rico or its citizens, it can never authorize an intrusion on the constitutionally recognized prerogative of the States to fix voting qualifications with respect to their own elections. We pretermit the last objection for the moment—deferring its considering to the last portion of the brief in which we discuss the reasonableness of the legislation insofar as it is said to impinge on States interests, a question common

[23] In relying on the Territorial Clause we do not mean to ignore recent developments affecting the status of the island which may bear on the present scope of that power. See *infra*, pp. 27–30. See, also, App., *infra*, pp. 52–55.

[24] We do not stop to consider the objection made below (see R. 90) that, in enacting Section 4(e), Congress expressly invoked only its power under the Fourteenth Amendment. We have already noticed the clear congressional purpose to reach Puerto Ricans, primarily, if not exclusively (*supra*, pp. 10–11). Accordingly, here Congress might properly draw on any number of complementary sources of power which suggest the same result. See *supra*, pp. 17–18.

to every aspect of congressional power invoked (*infra*, pp. 42–48)—and turn here to the first two claims which bear only on the assertion of the Territorial Clause.

1. The suggestion that the territorial power wholly ends at the shores of the mainland is rebutted by the decisions already cited. Thus, in *Downes* v. *Bidwell*, *supra*, this Court sustained under the Territorial Clause an otherwise unconstitutional special tariff enacted for the benefit of Puerto Rico but collected in the United States on imports from the island. And in *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, the payment to the Philippines of the proceeds of a domestic tax was upheld, at least alternatively, on the basis of the broad powers of the Congress with respect to the territories. See *id.* at 313–318, 320, 322–324. Nor is the rule limited to money matters. In the *Downes* case itself it was expressly asserted that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be * * *." 182 U.S. at 279. See, also, *Rabang* v. *Boyd*, 353 U.S. 427, 432–433. The status granted, of course, survives migration to the mainland. Indeed, the right freely to enter the United States was perhaps the most important attribute of citizenship.[25]

[25] The grant of citizenship in 1917 had little, if any, effect at home. In *Balzac* v. *Porto Rico*, *supra*, this Court held that, except as expressly stipulated by the Jones Act (see § 2), the guarantees of the Bill of Rights were not thereby extended to the residents of the island.

That is expressly recognized in the passage already quoted from the *Balzac* case (*supra*, p. 23), in which the Court emphasized that one of the intended benefits of citizenship when it was conferred on the inhabitants of Puerto Rico was precisely to enable them to come to the mainland on a footing of "exact equality with citizens from the American homeland" and there "enjoy all political and other rights." 258 U.S. at 311.

Obviously, the consequences of granting citizenship to Puerto Ricans have been felt within the continental United States, in every State in which they reside. As the Court said in *Balzac*, "[i]t enabled them to * * * becom[e] residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political." 258 U.S. at 308. Whether because they are citizens and are therefore protected from State "law[s] which shall abridge the privileges and immunities of citizens of the United States" (Fourteenth Amendment, Sec. 1; see, *e.g.*, *Ex parte Yarbrough*, 110 U.S. 651; *Oyama* v. *California*, 332 U.S. 633), or because, being citizens, they were enabled to migrate to the States and, as mere residents, are entitled to due process and equal protection (see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 339 U.S. 33; *Takahaski* v. *Fish Comm'n.*, 334 U.S. 410), and the other rights enjoyed by all who abide here (see, *e.g.*, *Edwards* v. *California*, 314 U.S. 160), the congressional decision responsible for their coming has necessarily affected the States where they chose to reside, overriding any contrary local policy.

Thus, it is plain that the powers of Congress under

the Territorial Clause (like its authority to implement treaties, see *Missouri* v. *Holland*, 252 U.S. 416; *Baldwin* v. *Franks*, 120 U.S. 678, 683) may properly reach within the boundaries of a State. It need hardly be added that the legitimacy of congressional legislation affecting the rights of persons born in a territory does not depend on their location within or without the continental United States at the time of the enactment. We assume that some Puerto Ricans were on the mainland when the Jones Act was passed in 1917 (see R. 73) and that they, as well as the then inhabitants of the island, became citizens at that time.[26] Any doubt on this score, however, is resolved by the decision in *Rabang* v. *Boyd*, 353 U.S. 427, in which it was held that Filipinos lawfully admitted for permanent residence here lost their status as nationals and became aliens subject to deportation under legislation enacted pursuant to the territorial power when their country was proclaimed independent.

2. Equally untenable would be any contention that Congress lost all its powers under the Territorial Clause when Puerto Rico became a commonwealth. Doubtless, by agreeing to a new status for the island and ratifying the Puerto Rican Constitution (66 Stat. 327), the federal legislature relinquished a large measure of control over Puerto Rican affairs. There is no occasion to discuss here the varying views

[26] All residents of the island had been declared "citizens of Porto Rico" in Section 7 of the Foraker Act (31 Stat. 79), and all citizens of Puerto Rico were made citizens of the United States by Section 5 of the Jones Act without regard to their residence (39 Stat. 953).

which have been expressed concerning the revocable or irrevocable character of the grant of autonomy and the nature and extent of Congress' present powers over Puerto Rico. See the memorandum of Assistant Attorney General Kramer, in *Hearings on H.R. 9234 before a Special Subcommittee of the House Committee on Interior and Insular Affairs*, 56th Cong., 1st Sess. (1959). Nor need we mark the exact limits of the existing division of responsibility between the two governments.[27] The present legislation—which expends itself wholly within the United States—does not in the least encroach on the Commonwealth's right of self-government. For present purposes, it is enough to notice there is continuing congressional jurisdiction over some matters affecting Puerto Rico, including foreign relations,[28] defense,[29] immigration and naturalization,[30] postal,[31] and monetary affairs,[32] and those activities which are traditionally subject to interstate regulation.[33] See, also, 48 U.S.C. 734.[34] Indeed, in testing the applicability of the Territorial Clause in the present context, it is perhaps sufficient to say that Puerto Rico is not an independent nation

[27] Those questions are presently under consideration by the United States-Puerto Rico Commission on the Status of Puerto Rico. See Pub. L. 88-271, 78 Stat. 17.

[28] *E.g.*, 22 U.S.C. 284g.

[29] *E.g.*, 32 U.S.C. 109.

[30] See 8 U.S.C. 1101(a)(38).

[31] *E.g.*, 39 U.S.C. 705(e).

[32] *E.g.* 48 U.S.C. 741(a), 745.

[33] *E.g.*, 29 U.S.C. 213(f) (Fair Labor Standards Act).

[34] The cited provision of the Puerto Rican Federal Relations Act provides in pertinent part: "The statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Puerto Rico as in the United States * * *." See *Rios* v. *United States*, 256 F. 2d 63 (C.A. 1).

and that its natives are still citizens of the United States. That was, in effect, the ruling in the *Cincinnati Soap Co.* case with respect to the Philippines after those islands had achieved a comparable "commonwealth" status. The strikingly appropriate words of that decision bear repeating (301 U.S. at 319–320):

> * * * it is contended that the passage of the Philippine Independence Act of March 24, 1934, c. 84, 48 Stat. 456, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; and that since then, whatever may have been the case before, the United States has been under no duty to make any financial contribution to the islands. Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory. By express provision of the Independence Act, we still retain powers with respect to our trade relations with the islands, with certain exceptions set forth particularly in the act. We retain powers with respect to their financial operations and their currency; and we continue to control their foreign relations. The power of review by this court over Philippine cases, as now provided by law, is not only continued, but is extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands.

> Thus, while the power of the United States has been modified, it has not been abolished. Moral responsibilities well may accompany the process of separation from this country; and, indeed, they may have been intensified by the new and perplexing problems which the Philippine people now will be called upon to meet as one of its results. The existence and character of the consequent obligations and the extent of the relief, if any, which should be afforded by the United States in respect of them, are matters, not for judicial but for Congressional consideration and determination.

In short, whatever its present limits, there yet remains some power in the national Congress to legislate for the benefit of Puerto Ricans. At the least, it would seem, the federal legislature is authorized to carry out its old obligations toward the islanders it has invited here by providing a remedy that Puerto Rico is powerless to afford. Section 4(e) does no more.

II. SECTION 4(E) IS APPROPRIATE LEGISLATION UNDER THE FIFTH SECTION OF THE FOURTEENTH AMENDMENT

Strong arguments have been advanced to show that the Fourteenth Amendment, *ex proprio vigore,* outlaws State voting qualification rules (like those of New York) which discriminate against residents who, though literate in their native language, cannot read and write English—at least when the otherwise qualified applicants constitute a substantial minority who possess all the means of adequately informing themselves concerning the electoral issues and candidates. See Appellant's Brief in *Cardona* v. *Power,* No.

673, this Term, certiorari granted January 24, 1966. That contention is the more forceful when we recognize that the discrimination operates against persons whom Congress invited here an account of their education in what is, after all, on official American language—and therefore violates a long-standing policy of the United States. Even aliens might successfully claim exemption from hostile State legislation abridging fundamental rights under these circumstances. Cf. *Truax* v. *Raich*, 239 U.S. 33; *Takahashi* v. *Fish Comm'n.*, 334 U.S. 410. Citizens doubtless have a stronger right. But, in our view, those questions are not necessarily presented by the instant case. The issue here is, rather, whether the express congressional determination that it is impermissible, in the actual circumstances, to bar citizens from the vote on the sole ground of their literacy in a language other than English (albeit in an American language in law and in fact) is a proper exercise of the power to "enforce" the guarantees of the Fourteenth Amendment—notwithstanding the Amendment, of its force, may not annul the State rule affected by the legislation.

Underlying our statement of the question presented are two assumptions: that Section 5 of the Fourteenth Amendment invests the Congress with *some* authority to legislate with respect to State voting qualifications; and that the powers of the legislative branch of the national government, in this particular, are somewhat broader than those of the federal judiciary. We do not elaborate the first point, for it seems self-evident

that if Section 1 itself may restrict the State prerogative in this matter, as is now settled (*Carrington* v. *Rash*, 380 U.S. 89; *Louisiana* v. *United States*, 380 U.S. 145; *United States* v. *Texas* (E.D. Tex.), decided February 9, 1966),[35] Section 5—which applies to all the guarantees of the Amendment—authorizes Congress to legislate with respect to any matter within the purview of the first section. We turn immediately to our second premise.

It is, of course, a principle of general application that the Congress, when exercising its express powers, may paint with a broader brush than the courts. See *Everard's Breweries* v. *Day*, 265 U.S. 545; *Currin* v. *Wallace*, 306 U.S. 1; *United States* v. *Darby*, 312 U.S. 100. That is, in part, a necessary corollary of the regulatory function of legislation. But it implies also a recognition that the marking of constitutional boundaries often involves judgments which are best left to the legislative branch. See *South Carolina* v. *Katzenbach*, No. 22, Original, decided March 7, 1966, slip opinion, pp. 18–21. Invoking this principle, we suggest it is appropriate to concede a role to the Congress in delineating the content of "equal protection"—otherwise a guarantee of uncertain boundaries and varying applications—and in defining the "privileges and immunities of citizens as they bear on the exercise of the franchise—a peculiarly political matter.

1. Certainly nothing in the history of the adoption

[35] See, also, Brief for the United States as *amicus curiae* in *Harper* v. *Virginia Board of Elections*, No. 48, this Term, pp. 15–23.

of the Fourteenth Amendment opposes that suggestion. On the contrary, in the congressional debates leading to the adoption of the Amendment there was repeated emphasis on the importance of the grant of power to Congress under Section 5. Thus, speaking on behalf of the Joint Committee, Congressman Stevens said that the Amendment "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Cong. Globe, 39th Cong., 1st Sess., p. 2459. Senator Poland stressed the same point:

> It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the states. [Cong. Globe, 39th Cong. 1st Sess., p. 2961.]

Although the debate did not focus on the exact extent of legislative authority under the enforcement clause, the principal exposition of the reach of the clause indicates an understanding that Congress would implement the broad protections against prohibited State action. When Senator Howard of Michigan reported to the Senate on May 23, 1866, for the Joint Committee, he explained that if rights were to be "effectuated and enforced" it was requisite that "additional power should be given to Congress to that end;" Section 5 met that need, in his view, because it was "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." The enforcement

clause would empower the Congress "in case the States shall enact laws in conflict with the principles of the amendment to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., p. 2765–2768. Though not expressly articulated, it seems clear that the power to enact corrective legislation included authority, to be shared with the courts, to determine when there was a departure from the principles expressed in Section 1.

This was undeniably the view taken by many who opposed the Amendment in the ratification debates. Thus, the Committee on Federal Relations of the Florida House of Representatives wrote that the Amendment

> vests in the General Government the power to annul the laws of a State affecting the life, liberty and property of its people, if Congress should deem them subject to the objections therein specified. [Florida House Journal, 76 (1866).]

And an opponent of ratification in the Pennsylvania House of Representatives argued that Section 5 "undoubtedly confers upon Congress the power to define what are the 'privileges and immunities' of citizens," Pa. Leg. Rec. at App. p. 111, while the Governor of North Carolina warned that

> Congress is hereafter to become * * * the guarantor of equal protection of the laws, and, by appropriate legislation, to declare a system of rights and remedies. [North Carolina House J. 29 (1866–1867).]

2. That the early Congresses so understood their mandate is amply shown by the legislation they enacted. While much of it was procedural or remedial, there were also definitional provisions that gave substance to the post-Civil War amendments. Thus, the Thirteenth Amendment—whose enforcement clause is identical to the Fourteenth's—was very soon implemented by the Civil Rights Act of 1866 (14 Stat. 27) which purported to confer specific rights on the former slaves as an incident of their emancipation (see *Civil Rights Cases,* 109 U.S. 3, 33). And, the next year, by the Peonage Abolition Act (14 Stat. 546, 18 U.S.C. 444), Congress defined "involuntary servitude" as including Mexican "peonage." See *Clyatt* v. *United States,* 197 U.S. 207; *Pollock* v. *Williams,* 322 U.S. 4. Ambitious attempts to "enforce" the Fifteenth Amendment under a comparable grant of power by the Enforcement Act of 1870 (16 Stat. 140) were struck down (see *United States* v. *Reese,* 92 U.S. 214; *James* v. *Bowman,* 190 U.S. 127), but there yet survives at least one provision of that statute which authoritatively defines the scope of the constitutional exemption from racial discrimination in voting as including "any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision." See 42 U.S.C. 1971(a). And so it was with respect to legislation implementing the Fourteenth Amendment.

The Enforcement Act of 1870, 42 U.S.C. 1981, already mentioned, reenacted the provisions of the Civil Rights Act of 1866 as appropriate legislation to enforce the

Equal Protection Clause. That guarantee was now declared applicable to the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefits of all laws and proceedings for the security of person and property," 14 Stat. 27; see 42 U.S.C. 1981, 1982; *Buchanan* v. *Warley,* 245 U.S. 60; *Shelley* v. *Kraemer,* 334 U.S. 1. Some efforts to extend equal protection were held excessive. See Section 2 of the Ku Klux Klan Act of April 20, 1871 (17 Stat. 13), invalidated in *United States* v. *Harris,* 106 U.S. 629, and *Baldwin* v. *Franks,* 120 U.S. 678; and Sections 1 and 2 of the Civil Rights Act of 1875 (18 Stat. 335, 336), declared unconstitutional in the *Civil Rights Cases,* 109 U.S. 3. But other definitional provisions have survived. Thus, Section 3 of the Act of 1871 legislatively determined that a State's inability to protect the constitutionally protected rights of "any portion or class" of its inhabitants in time of domestic violence "shall be deemed a denial by such State of the equal protection of the laws." 17 Stat. 14, 10 U.S.C. 333; see *Alabama* v. *United States,* 373 U.S. 545, and Brief for the United States in that case (No. 15, Original, October Term, 1962). And, finally, by Section 4 of the Civil Rights Act of 1875, *supra,* Congress gave specific content to the Equal Protection Clause by outlawing racial discrimination in the selection of juries. 18 Stat. 336, 18 U.S.C. 243. See *Strauder* v. *West Virginia,* 100 U.S. 303; *Ex parte Virginia,* 100 U.S. 339.

Plainly, the legislators of the post-war decade viewed Section 5 of the Fourteenth Amendment (and

the comparable enforcement clauses of the Thirteenth and Fifteenth Amendments) as authorizing more than procedural or remedial legislation; they deemed it to be their function to translate into concrete specifics the rather vague generalities of Section 1. Contemporaries, and many of them participants in the drafting of the Amendment,[28] their understanding of the enforcement clause is entitled to deference. To be sure, this Court found that they had sometimes overreached the boundaries; but there has been no repudiation of the basic approach followed by the first "enforcers" of the Fourteenth Amendment.

3. In its initial decisions construing the reach of the Reconstruction Amendments, this Court recognized the important role the Congress would play in vitalizing the broad guarantees. Thus, the *Slaughter House Cases*, 16 Wall. 36, although narrowly confining the reach of the Privileges and Immunities Clause, expressed the view that if the States did not conform their laws to the mandate of the Equal Protection Clause, "then by the fifth section of the article of the Amendment Congress was authorized to enforce it by suitable legislation." *Id.* at 81. Likewise, in the *Civil Rights Cases*, 109 U.S. 3—albeit the Court invalidated a measure enacted under Section 5 because it sought, quite unnecessarily in light of adequate State laws, to regulate conduct which the Court viewed as wholly private—there was an express recognition

[28] The government's brief in the pending case of *United States* v. *Guest*, No. 65, this Term, pp. 38–39, analyzes the record of those legislators who voted on the Fourteenth and Fifteenth Amendments and the Acts of 1870 and 1871.

of congressional power "to adopt appropriate legislation for correcting the effects of * * * prohibited State laws * * *." *Id.* at 11. But, more revealing are the jury discrimination cases decided in 1880, *Strauder* v. *West Virginia*, 100 U.S. 303, and *Ex parte Virginia*, 100 U.S 339. In *Strauder* the Court endorsed congressional legislation permitting removal of cases from State to federal court where a State by statute excluded all Negroes from jury service, and in *Ex parte Virginia* the Court upheld the provision of the Civil Rights Act of 1875 which penalized State officials guilty of excluding qualified citizens from jury service "on account of race, color, or previous condition of servitude."

The decisions are noteworthy because they seem to accord great respect to the congressional determination that racial discrimination in jury selection offends the Equal Protection Clause, a conclusion far from compelled by the historical evidence of the intent of the framers of the Amendment. See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 145 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 56, 64–65. That there was deference to the judgment of Congress is eloquently shown by the following passage from the opinion of the Court in *Ex parte Virginia*, (100 U.S., *supra*, at 345–346):

> All of the amendments derive much of their force from [the enforcement sections]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immu-

> nities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to to prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

The Court has had little occasion to speak to the question since those early cases because, from 1875 until the present decade, no legislation was enacted implementing any of the Civil War Amendments. But, see, *United States* v. *Guest,* No. 65, and *South Carolina* v. *Katzenbach,* No. 22, Original, this Term. One recent opinion respecting the role of the Congress as pioneer in delimiting the Equal Protection Clause is worthy of note, however. In *Fay* v. *New York,* 332 U.S. 261, the Court rejected several challenges to the "blue ribbon" jury system of that State, emphasizing that Congress had not spoken with respect to any discrimination in jury selection except that based on race or color, which had been explicitly outlawed since 1875. Referring to that provision, the opinion continues (332 U.S. at 282–284):

> * * * For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress. * * *
>
> * * * It is significant that this Court never has interfered with the composition of state court juries except in cases where this guidance of Congress was applicable. * * *
>
> * * * We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process.[37]

In sum, we submit that Senator Javits—one of the

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[37] In a note at this point in the opinion (332 U.S. at 284, n. 27), it is said:

"It is unnecessary to decide whether the equal protection clause of the Fourteenth Amendment might of its own force prohibit discrimination on account of race in the selection of jurors, so that such discrimination would violate the due process clause of the same Amendment. Nor need we decide whether the due process clause alone outlaws such discrimination. * * *"

co-sponsors of the legislation in suit—correctly stated the import of the enforcement section of the Amendment when he insisted that "it means that Congress may not only restrain States from violating the 14th Amendment, but may also use its judgment as to what is equal protection of the laws * * *." 111 Cong. Rec. 10680 (daily ed.). What is more, as *Fay* v. *New York* suggests, there are some occasions at least when it is wholly proper for Congress to take the initiative in marking the limits of permissible State action under the Fourteenth Amendment. Professor Freund, as quoted by Senator Kennedy in the legislative debates (*id.*, at 10677), has put it well:

> Just as Congress may give a lead to the courts under the commerce clause in prohibiting certain kinds of State regulation or taxation, and just as Congress may expressly prohibit certain forms of taxation of Federal instrumentalities, whether or not the courts have done so of their own accord, so in implementing the 14th and 15th amendments Congress may legislate through a declaration that certain forms of classification are unreasonable for purposes of the voting franchise.

The present instance, it seems to us, is a peculiarly appropriate exercise of that congressional responsibility. Not only does the matter in suit involve the electoral process—an area of special legislative competence, one may assume—but the congressional power is employed to effectuate a federal policy with respect to peoples who have a special claim to the protection of the Congress. See *United States* v. *County Board of Elections*, 248 F. Supp. 316 (W.D.N.Y.), appeal pending, No. 1040, this Term.

III. SECTION 4(e) DOES NOT UNREASONABLY IMPINGE ON THE RIGHT OF THE STATES TO FIX VOTING QUALIFICATIONS AND PROCEDURES

Thus far, we have examined the complementary sources of congressional power which seem to authorize the challenged legislation. But we have largely ignored the objection that, whatever the scope of those powers in other areas, their exercise in the premises unduly impinges on the State prerogative to fix voting qualifications and procedures with respect to its own elections. We now turn to that question, discussing it on the assumption that the same test of reasonableness applies whether Section 4(e) is predicated on the Territorial Clause, the power to implement treaties, or the enforcement section of the Fourteenth Amendment—albeit the limitations upon the Congress may be somewhat less if either of the first named powers is properly invoked and sufficient to sustain the provision.

At the outset, we suppose it now settled that Article I, Section 2, of the original Constitution and the Seventeenth Amendment, in referring to "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," do not confer on the States an absolute prerogative to grant or withhold the franchise on any conditions they choose. We have recently had occasion to discuss that question at some length in briefs now before the Court in two related cases [38] and will not burden the Court with a reiteration of that argumentation. For present purposes, it seems wholly sufficient to point to the recent decisions here in *Car-*

[38] See Brief for the Defendant, in *South Carolina* v. *Katzenbach*, No. 22, Original, pp. 33–38; Brief for the United States

rington v. *Rash*, 380 U.S. 89, and *Louisiana* v. *United States*, 380 U.S. 145. See, also, *United States* v. *Texas* (E.D. Tex.), decided February 9, 1966, and the concurring opinion of Johnson, J., in *United States* v. *Alabama* (M.D. Ala.), decided March 3, 1966. On the other hand, we freely concede the primary responsibilities of the States in this area and assert no general power in the national legislature to substitute its own mere preferences for the reasonable qualifications fixed by State law. The fact is that the legislation in suit does not remotely involve the attempted exercise of any such sweeping federal prerogative.

The issue here is very narrow.[39] New York and the other States affected by Section 4(e) have decided to demand literacy of their electorate. We do not quarrel with that choice. The sole effect of Section 4(e) is to require the States involved to admit to the vote literate citizens who speak another language. And that liberalization of the local law, Congress could reasonably conclude, would not destroy the only legitimate purposes of conditioning the right to vote on literacy. Indeed, it is a proper assumption that the quality of the electorate in terms of education, political judgment, and moral character is not materially affected by providing that literacy shall be in

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as *Amicus Curiae*, in *Harper* v. *Virginia Board of Elections*, No. 48, pp. 15–23.

[39] We agree with the view of Judge McGowan, dissenting below: "The challenge here made to Section 4(e) goes mainly to the existence of Congressional power, and not to the propriety, in terms of reasonableness, of this particular exercise of it. This emphasis is tactically well-advised, since there would appear to be little doubt on the latter score" (R. 100, n. 6).

either English or Spanish, rather than exclusively in English. And it is likewise reasonable to suppose that whenever there is a substantial body of voters who are illiterate in English, but literate in another language, public officials, political candidates, and the news media quickly and easily adapt to provide such voters substantially the same information on the issues and the candidates as is available to other voters.

The soundness of those conclusions is demonstrated by the availability of Spanish language newspapers and radio and television broadcasts in many parts of New York State [40]—as the sponsors of the legislation informed their colleagues.[41] Also instructive is the fact that political candidates in New York have adjusted to their bilingual constituencies.[42] We have a

[40] The record in this case includes affidavits of the managers of New York's two major Spanish-language newspapers and its three full-time Spanish-language radio stations (R. 50–59). It is shown that complete national and local news coverage is available to the Spanish speaking citizen. The statement of Stanley Ross, editor of "El Tiempo," typifies the extent of this coverage (R. 50):

> The paper subscribes to the United Press International wire service from which we receive reports in both Spanish and English. We also subscribe to several non-wire minor news services whose items we receive by mail in both Spanish and English. The English news service reports and items and any press releases or information we receive in English from local and state political leaders and office holders are translated into Spanish for publication.

[41] See, *e.g.*, statements of Senator Kennedy, 111 Cong. Rec. 10675 (daily ed. May 20, 1965) and Representatives Gilbert, *id.* at 15666 (daily ed. July 6, 1965) and Ryan, *id.* at 15102 (daily ed. July 6, 1965).

[42] See the affidavits of Bronx Borough President Badillo (R. 58), State Assemblymen Ramos-Lopez (R. 61) and Rios (R. 63), and State Senate candidate Cecilia (R. 59).

further indication in the policy of other States which have made accommodations for persons whose major language is other than English. Thus, Hawaii allows persons literate in either English or Hawaiian to vote (Rev. Laws of Hawaii (1955), Sec. 11–8; see, also, Sec. 11–38, requiring the printing of candidates' names in both languages), and Louisiana provides that an applicant must be able to read and write in the English language *or* his mother tongue. Louisiana Constitution, Article 8, Sec. 1.[43] So, also, in New Mexico, which has a large Spanish-speaking population, there is no English literacy requirement and ballots and instructions to applicants for registration are printed in both English and Spanish. New Mexico Statutes (1953) Sec. 3–3–7; 3–3–12; 3–2–41.[44] Indeed, New York itself requires that certain notices displayed in the New York City Criminal Court be printed in Spanish, as well as in Italian, Yiddish, and

[43] Although today Louisiana law provides for statutes to be printed in English only, La. Rev. Stat. (1950) 43:18, 43:19, the State Constitutions of 1845 (Art. 132) and 1852 (Art. 129) provided that the Constitutions and statutes should be promulgated in both English and French. The 1845 Constitution also expressly required that the Secretary be conversant in English and French; and members were permitted to address the legislature in either language (Constitution of 1845, Art. 104).

[44] See, also, the remarks of Senators Kennedy, Long, and Holland, 111 Cong. Rec. 10676–10678 (daily ed. May 20, 1965), and the affidavits in the record from office-holders in Louisiana [Rep. Edwin Willis (R. 67)], Texas [State Reps. Johnson (R. 64) and Alaniz (R. 66)], and New Mexico [Attorney General Witt (R. 69)].

English. McKinney's New York Laws, Bk. 29A, Pt. III, N.Y. Criminal Court Act, Art. 5, Sec. 50.[48]

Against these examples of accommodation, it is difficult to appreciate that New York's decision to exclude Spanish-speaking citizens from the franchise is dictated by governmental necessity. There is no suggestion that States which permit non-English speaking persons to vote have suffered thereby; nor, indeed, is there any indication that problems peculiar to New York may explain its policy. Conversely, it cannot be said that Congress has imposed upon the State an uneducated or uninformed electorate.

Finally, there is no basis for a claim that a substantial administrative burden has been imposed on the affected States—even assuming that such a consideration could outweigh an otherwise unjustified restriction of the franchise. See *Carrington* v. *Rash*, 380 U.S. 89, 96. Section 4(e) requires no State to devise and administer a Spanish literacy test. Under the statute, the only acceptable evidence of literacy in a language other than English is completion of six grades in an approved school (or a higher educational achievement if the State requires it of its English

[48] Other examples of State accommodation to non-English speaking minorities include the New Mexico requirement that certain official notices be printed in Spanish as well as in English. (*E.g.*, New Mexico Statutes (1953) 73-8-25; 75-21-3; 75-22-3; 75-23-4; 75-28-3; 10-2-11); the Hawaii requirement that notices of auctions of public lands be printed in both Hawaiian and English (Rev. Laws of Hawaii (1955) Sec. 99-40); and California's statute authorizing certain welfare informational material to be printed in Spanish only, or in Spanish and English (West's Anno. Calif. Code, Welfare and Institutions Section 10607).

speaking voters).[46] In this respect, the federal legislation adopts one of New York's modes of demonstrating literacy—the least burdensome for the State.[47] While Section 4(e) does not specify the manner of "demonstrating" the requisite educational achievement, it has been construed in practice—we think correctly—as following the local procedure. Thus, even here, the accommodation is complete. That the federal law, in fact, creates no difficult administrative problems is attested by the ease with which election officials in several Connecticut cities (R. 45–49), and New York City itself (R. 44), have adjusted to the new requirement.

We conclude, in light of the important policies served and the clear power to effectuate them, that the challenged legislation does not unduly trespass on the legitimate prerogatives of any State and imposes no substantial administrative burden. Accordingly, it should be upheld.

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[46] Until July 1965, New York required satisfactory completion of *eight* grades as an alternative to submitting to the literacy test, and a similar achievement would have been required of Spanish-speaking residents of the State. While the Voting Rights Act was pending in Congress, however, New York lowered its educational requirement to six grades satisfactorily completed. McKinney's 1965 Session Laws of New York, c. 797, § 1.

[47] In order to spare the affected States the burden of administering a foreign language test, Section 4(e) does not require them to register Puerto Ricans who, though literate in their own language and able to successfully complete a test, have not attended a formal school for the required period. In this respect, full parity is not demanded out of deference for State administrative problems.

CONCLUSION

For the foregoing reasons, the constitutional challenge to Section 4(e) of the Voting Rights Act of 1965 should be rejected and the judgment below reversed.

Respectfully submitted.

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APPENDIX

A. THE TREATY OF PARIS AND FEDERAL REGULATORY LEGISLATION

At the termination of the Spanish American War, Spain ceded Puerto Rico to the United States by Article II of the Treaty of Paris of 1898, 30 Stat. 1754, 1755. Prior to 1898 Puerto Rico, as a Spanish province, had experienced varying degrees of political autonomy from the Spanish crown,[1] but in 1897, just a year before the Spanish American War, a comprehensive charter of self-rule regarding internal affairs was granted by the royal crown.[2] Upon cession to the United States, the people of Puerto Rico anticipated that the political autonomy achieved by the decree of 1897 would be preserved, indeed enlarged, by severance of the old ties with a monarchial government and the new association with a republican democracy.[3] These expectations were not immediately realized.

Article IX of the Treaty of Paris provided (30 Stat. 1759): "The civil rights and political status of

[1] See Fernos-Isern, *From Colony to Commonwealth*, 285 Annals 16–17 (1953).

[2] Royal Decree of November 25, 1897, Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897, Documents on the Constitutional History of Puerto Rico 31–46 (1964).

[3] Fernos-Isern, *supra* note 1, at 18. The expectation regarding the 1897 decree may have been exaggerated in view of the authority retained by the crown through the appointed Governor General. See Magruder, *The Commonwealth Status of Puerto Rico*, 15 Pitt. L. Rev. 1, 2 (1953).

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the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." The treaty made no further reference to the future form or source of government for the Island. Following two years of temporary military rule,[4] Congress, in the first Organic Act of Puerto Rico (commonly known as the Foraker Act, 31 Stat. 77) established a territorial government for the Island controlled almost entirely by appointees of the President of the United States. Its principal features were a strong executive authority vested in a governor appointed by the President; executive department heads appointed by the President; an eleven-member upper legislative assembly (known as the Executive Council), all appointed by the President; a lower legislative assembly chosen by an electorate whose qualifications were to be established by the presidentially appointed Executive Council; a Supreme Court of judges appointed by the President, and lower courts administered by appointees of the governor (31 Stat. 81–84). The inhabitants were given their choice of remaining Spanish subjects or becoming "citizens of Puerto Rico"; they were not made American citizens (31 Stat. 79).

Discontent among Puerto Ricans with their lack of political autonomy under the Foraker Act and a developing sense in Congress of the advisability of modifying the relationship between the United States and Puerto Rico to reduce tensions between the two[5] led to passage of the Jones Act in 1917. 39 Stat. 951, 48 U.S.C. 731 *et seq.* Most significantly, Amer-

[4] Fernos-Isern, *supra*, note 1, at 18.

[5] See Magruder, *The Commonwealth States of Puerto Rico*, 15 Pitt. L. Rev. 1, 6 (1953); Hanson, *Transformation: The Story of Modern Puerto Rico*, 50–51 (1955) (hereinafter cited as Hanson.)

ican citizenship was conferred on all native Puerto Ricans (39 Stat. 953) and certain constitutional guarantees were specifically extended to the new citizens (39 Stat. 951). An elective senate replaced the presidentially appointed Executive Council as the upper legislative assembly (39 Stat. 958), and four of the six department heads were to be appointed by the governor rather than the President of the United States. *Id.* at 956. The Resident Commissioner to the United States—an elective office created by the Foraker Act—was granted certain privileges in the House of Representatives but not the right to a vote. *Id.* at 963, 48 U.S.C. 891–894.

Puerto Rico's agrarian economy experienced significant growth and change during the first three decades of American control, although a skepticism prevailed regarding the degree to which Puerto Ricans themselves benefited from this growth.[6] The decade of the 1930's, however, was a disaster for Puerto Rico. Poverty, disease and complete economic collapse were endemic to the entire island.[7] The widespread frustration sometimes found political expression in anti-Americanism and demands for complete independence.[8] The period produced the formation and growth of the Popular Democratic Party under the leadership of Luis Munoz-Marin, later to become the first popularly elected Governor of Puerto Rico.[9] Munoz developed a consensus among Puerto Ricans in favor of a special political status for the island vis-à-vis the United States which

[6] See Hanson at 29–35; Perloff, *Transforming the Economy*, 285 Annals 48 (1953).

[7] Hanson, Ch. IV; Tugwell, *The Stricken Land*, 33–34 (1947); Moscoso, *Industrial Development in Puerto Rico*, 285 Annals 60 (1953).

[8] Hanson at 77–93.

[9] Hanson at 172–189.

took into account the fiscal and economic dependence of the island and, at the same time, allowed for maximum political dignity and self-respect.[10] The people of Puerto Rico came to reject independence as a solution, partly for economic reasons, but, also, as Governor Munoz has expressed it, because of the "mutual respect which had developed between the peoples of Puerto Rico and the United States within our common citizenship." [11]

B. COMMONWEALTH STATUS

Further progress toward internal political autonomy and mutual good will was achieved in the 1940's when President Truman appointed Puerto Rico's first native-born Governor, Jesus T. Pinero,[12] and when Congress in 1947 amended the Jones Act to provide for the popular election of Governor. 61 Stat. 770.

The development toward a new and different relationship between the United States and Puerto Rico—which had its genesis in the growth of the Popular Democratic Party in the late 1930's—culminated in Congressional action in 1950 providing for the organization of a constitutional government by the people of Puerto Rico. 64 Stat. 319, 48 U.S.C. 731 *et seq.* (known as Public Law 600).

The debates over Public Law 600 and the subsequent debates over Congressional ratification of the Constitution of Puerto Rico reflect a Congressional desire to promulgate self-government and self-determination in Puerto Rico. Congress hoped that Puerto Rico

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[10] See Hanson at 188–189; Tugwell, *The Stricken Land*, 83 (1947).

[11] Munoz-Marin, *Development Through Democracy*, 285 Annals 1, 5 (1953).

[12] Hanson at 208.

would serve as a example to other Latin American countries. Thus, the Report of the Senate Committee on Interior and Insular Affairs on the bill to provide for the adoption of a Puerto Rican Constitution declared [S. Rept. No. 1779, 81st Cong., 2d Sess. (vol. 3) 2 (1950)]:

> This measure is designed to complete the full measure of local self-government in the island by enabling the 2¼ million American citizens there to express their will and create their own territorial government * * *
>
> Thus, in the only Latin-American area under the American flag, which is a focal point of inter-American relations, the present measure would give further concrete expression to our fundamental principles of government of, by, and for the people. It is a logical step in the process of political freedom and economic development that was begun even in the days of our military occupation of the island at the end of the last century.

The Report included a letter from Assistant Secretary of State McFall, who wrote to the Senate Committee on behalf of the Secretary of State that:

> It is believed that, with their own constitution, the high degree of internal self-government which the Puerto Ricans today enjoy in their voluntary association with the United States, will assume for them an added significance. Moreover, such action by our government would be in keeping with the democratic principles of the United States and with our obligations under the Charter of the United Nations to take due account of the political aspirations of the people in our Territories and to develop self-government in them.
>
> In view of the importance of "colonialism" and "imperialism" in anti-American propaganda, the Department of State feels that S. 3336 would have great value as a symbol of

> the basic freedom enjoyed by Puerto Rico, within the larger framework of the United States of America.[13]

The Senate approved the bill without debate or opposition. 96 Cong. Rec. 83221 (1950).

The House Committee on Public Lands also held hearings[14] on the Senate bill and reported it with minor amendments. The House Report stated (H. Rep. No. 2275, 81st Cong., 2d Sess. 2):

> By permitting the people of Puerto Rico to formulate and by their own initiative and choice adopt a Constitution, S. 3336 would further implement the self-government principle established by the Congress as the cornerstone and fundamental policy governing the relationship of the United States toward territories over which it has jurisdiction.

The House Committee emphasized the preparedness of Puerto Ricans for the exercise of political responsibilities (*id.* at 4):

> In conclusion, it is the feeling of this committee that the people of Puerto Rico have demonstrated by their intelligent administration of local governmental activities, by their extensive use of the franchise, and by their

[13] See letter of the Secretary of the Interior, Hon. Oscar Chapman printed in the Report; see, also, Hearings on Puerto Rico Constitution before the Senate Committee on Interior and Insular Affairs, 81st Cong. 2d Sess. (vol. 1) 2 1950), testimony of Resident Commissioner Fernos-Isern, 4–5; Asst. Secretary of State Miller, 15, and Justice Snyder of the Supreme Court of Puerto Rico, 22, 25.

[14] See Hearings on the Puerto Rico Constitution before the House Committee on Public Lands, 81st Cong. 2d Sess. (vol. 3), testimony of Gov. Munoz-Marin, 27; Rep. Lynch, 38; Asst. Sec. of State Miller, 46; Justice Snyder, 52, 55–56; Commissioner Fernos-Isern, 64–65; Rep. Howell, 113; and remarks of Rep. Barrett, 27.

> high degree of political consciousness, that they are eminently qualified to assume greater responsibilities of local self-government.

Following the adoption of the Puerto Rican Constitution, the United States notified the United Nations that Puerto Rico was no longer a non-self-governing area. Filed with the letter from Ambassador Lodge was a memorandum from the United States Government recognizing "the full measure of self-government which has been achieved by the people of Puerto Rico" and stating that it was no longer appropriate for the United States to transmit information on Puerto Rico to the United Nations as it was required to do for "non-self-governing nations" under Article 73(e) of the United Nations Charter. The memorandum states (28 State Dept. Bulletin 587):

> By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provision of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.[15]

C. SPANISH AS THE LANGUAGE OF INSTRUCTION IN THE SCHOOLS OF PUERTO RICO

Today Spanish is the language of instruction in Puerto Rican schools, but it has not always been so. Under the Organic Acts the authority to formulate the policies and curricula of Puerto Rican schools was delegated to a Commissioner of Education appointed by the President. 31 Stat. 81 (Foraker Act); 39

[15] This Court has also noted that "orderly development of the government of Puerto Rico as an integral part of our govern-

Stat. 956 (Jones Act).[16] Early policy strongly favored the predominant or exclusive use of English in the schools in the belief that such a course would facilitate the development of a dual American-Spanish culture on the island. This policy came to be rejected, with Congressional approval, because of the imposing difficulties in teaching young children in a language unknown to them outside of their classroom experience and because instruction in Spanish was the universal desire of the Puerto Rican people.

The policy of the first Commissioner of Education, Dr. Martin G. Brumbaugh, was "the conservation of the Spanish language and culture and the acquisition of the English language with all the cultural characteristics which such acquisition implies." [17] Initially English was merely a subject of instruction in the elementary grades but was not used as the language of instruction in teaching other subjects. In the high schools, however, it was used as the lan-

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mental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the island." *Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 510. See, also, *Bonet* v. *Texas Co.*, 308 U.S. 463, 470–471; *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 455–456; *Diaz* v. *Gonzales*, 261 U.S. 102, 105–106.

[16] The desire of Congress to maintain control over education in Puerto Rico was emphasized in the Jones Act of 1917 by the retention of Presidential power to appoint the Commissioner of Education while the power to appoint other executive department heads (except the Attorney General) was transferred to the Governor of the Island. The appointment of Commissioner required senatorial confirmation. 39 Stat. 956.

[17] Osuna, *A History of Education in Puerto Rico* (1949) at 342 (hereinafter cited as Osuna).

guage of instruction."[18] By 1903, the difficulties inherent in this half-way policy were manifest and it was decided to make English the language of instruction in all grades.[19] The school system struggled through a conversion period for a decade in which many American teachers were imported and an extensive English training program for native teachers was undertaken.[20] The program had been launched with an emotional fervor unaccompanied by pedagogical analysis. Under a new Commissioner in 1915, Dr. Paul G. Miller, the policy was re-examined. His Department issued a report in 1916 which identified and summarized the failure of the English language policy as follows:[21]

> * * * The evidence examined shows that the probable cause of this failure lies in a misconception of the method and material best suited to teach English to non-English speaking children who are studying at the same time their mother-tongue. This misconception is revealed in the attempt to teach English to the Puerto Rican children as if it were their mother-tongue, without regard to the fact that they live in a non-English environment, and without utilizing the advantages which accrue to the children from linguistic training in their native language.

The report recommended a modification of the all-English policy and the modification was put into operation by the Commission. Spanish became the

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[18] *Id.* at 343.

[19] *Id.* at 344.

[20] *Id.* at 345.

[21] *The Problem of Teaching English to the People of Puerto Rico*, Bulletin No. 1, Government of Puerto Rico, Dept. of Education, San Juan (1916), pp. 25–26.

language of instruction in the first four grades with English retained for the remaining grades.[22]

A 1926 survey of the schools in Puerto Rico sponsored by Columbia University concluded that using English as the language of instruction prior to the seventh grade was futile because of cultural and environmental barriers, and advised that the time and effort be turned to subjects relevant to the present and future lives of the students.[23] The proposals in the Columbia survey were rejected[24] and English remained the language of instruction for the fifth grade and above until 1934. In that year Commissioner José Padin, the author of the 1916 report on the failure of English instruction, ordered the use of Spanish as the language of instruction in the first eight grades.[25] The change did not connote abandonment of prior policies designed to achieve English literacy, but instead was described by Dr. Padin as a realistic adjustment intended to improve English facility without an inordinate sacrifice of other educational objectives.[26] The new policy, however was short-lived. The time was one of intense political turmoil in Puerto Rico and Congressional disenchantment with a variety of local programs and political ideas coalesced on the English language issue. Commissioner Padin was forced to resign[27] and his successor, Dr. José Gallardo, was di-

[22] Osuna at 350.

[23] *Survey of the Public Educational System of Porto Rico;* Studies of the International Institute of the Teachers College, Columbia University, No. 8, 1926, p. 29–31.

[24] *Annual Report of the Commissioner of Education of Puerto Rico*, 1925–1926, p. 25; see Clark, *Porto Rico and Its Problems* (1930), at 81.

[25] Osuna at 366.

[26] *Annual Report of the Commissioner of Education of Puerto Rico*, 1934–1935, pp. 1–2; Osuna at 366–368.

[27] Hanson at 53–56.

rected by President Roosevelt to intensify the teaching of English in order to achieve a bilingual population.[28]

The Gallardo period was one of great confusion in language policy. Its chief characteristic was the splitting of instruction time from the third grade forward in varying ratios between Spanish and English with Spanish predominating.[29] In 1942, Commissioner Gallardo joined his predecessors in forsaking English, as the language of instruction in the first six grades.[30] He testified before a Senate Sub-Committee in 1943 as follows:[31]

> We make efforts to teach English. We teach it through the elementary schools and in the high schools. However, the only opportunities for the use of English afforded to a child in Puerto Rico are exclusively those of the school. Teaching English is seriously handicapped by the environment, which is Spanish. The biggest mistake made by anyone is to think that we can achieve true bilingualism. In Puerto Rico it is impossible to obtain a situation where our people will master both languages equally well.

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[28] Letter of Appointment from President Roosevelt to Dr. Gallardo dated April 18, 1937, *The Public Papers and Addresses of Franklin Delano Roosevelt*, 1937 Volume, pp. 160–161 (1941). The letter was the first public expression from either a President or Congress on the language question in Puerto Rican schools. See Cebollero, *A School Language Policy for Puerto Rico* (1945), p. 27.

[29] Osuna at 377–381.

[30] *Annual Report of the Commissioner of Education of Puerto Rico*, 1941–1942, pp. 44–45.

[31] Hearings on Economic and Social Conditions in Puerto Rico Before a Subcommittee of the Senate Committee on Territories and Insular Affairs, 78th Cong., 1st Sess. at 230 (1943).

His testimony evoked Congressional and administration criticism.[32] Dr. Gallardo resigned in 1945 and, because none of the acceptable candidates to succeed him would commit themselves to an aggressive English language policy, the office remained vacant for two years.[33]

In 1946 the Legislature of Puerto Rico passed a bill providing for the use of Spanish as the language of instruction in the public schools,[34] but it was vetoed by President Truman. The President's veto message expressed no position on the merits of the language policy dispute, but tied solution of the language problem to the still unsettled question of political status for the Island. The President said:[35]

> Important as the language question may be, I regard the reaching of a permanent and satisfactory solution to political status as of greater importance, and I cannot permit a measure to stand which, in my opinion, would jeopardize that solution.

A permanent turn toward the use of Spanish as the exclusive language of instruction in the schools of Puerto Rico came in December 1946 with the interim appointment of Mariano Villaronga as Commissioner. Villaronga recognized that "English should be considered one of the most important studies in our edu-

[32] Letters from Secretary of Interior Ickes to Dr. Gallardo dated March 31 and April 15, 1943 reprinted in Osuna at 387–389; See also Hanson at 56–57.

[33] Hanson at 319; Osuna at 412.

[34] Senate Bill No. 51, Legislature of Puerto Rico, 1946 regular session.

[35] *Public Papers of the Presidents—Harry S. Truman, 1946*, pp. 466–467 (1962).

cation program" but should be treated "as a school subject and not as the medium for teaching all other subjects."[36] Although the Senate never confirmed Dr. Villaronga's appointment[37] his program received ultimate Congressional approval. In 1947 Congress amended the Organic Act to provide for the popular election of Governor and the appointment of department heads, including the Commissioner of Education, by the elected Governor. 61 Stat. 770. The House Committee on Public Lands in reporting out the bill observed that the federal policy of local autonomy "recently has been advanced by the appointment of residents of Puerto Rico to high government positions," including the Commissioner of Education, and that "[T]hese appointments have met with widespread approval in Puerto Rico."[38] The ensuing election of Governor Munoz led to Dr. Villaronga's reappointment as Commissioner,[39] and the permanent adoption of Spanish as the language of instruction in the public schools. In 1949, Dr. Villaronga outlined for Congress his program designed "to intensify the teaching of English * * * as a special subject rather than * * * as a medium of instruction for content subjects."[40] Passage of Public Law 600 in 1950 and the adoption of the Puerto Rican Constitution by the people in 1952[41] concluded the political-pedagogical struggle in favor of Spanish over English, a resolu-

[36] Speech of Dr. Villaronga quoted in Osuna at 413–414.

[37] Osuna at 412.

[38] H. Rep. No. 455, 80th Cong., 1st Sess. 3 (1947).

[39] Hanson at 319.

[40] Hearings on Minimum Wages and Education in Puerto Rico before a Subcommittee of the House Committee on Education and Labor, 81st Cong., 1st Sess. (vol. 3) 194 (1949).

[41] *Supra*, pp. 52–55.

tion which could not have occurred in the absence of deliberate Congressional approval."[43]

D. MIGRATION FROM PUERTO RICO TO THE MAINLAND

Puerto Ricans have enjoyed the right to move freely between the island and the mainland since 1917 when, by operation of section 5 of the Jones Act, they became American citizens (39 Stat. 953). Significant migration, however, did not begin until 1946 when almost 40,000 Puerto Ricans came to the mainland.[44] For the next fifteen years migration continued at a high level, but since 1960 has abated to token numbers, as shown in the following tables:[44]

Puerto Rican migration to the continental United States

Annual averages:		Each year, 1946–62—Con.	
1909–1930	1,986	1953	69,124
1931–1940	904	1954	21,531
1941–1950	18,794	1955	45,464
1951–1960	41,212	1956	52,815
1961–1964	1,234	1957	37,704
Each year, 1946–62:		1958	27,690
1946	39,911	1959	29,989
1947	24,551	1960	16,298
1948	32,775	1961	*—1,754
1949	25,698	1962	10,800
1950	34,703	1963	*—5,479
1951	52,899	1964	1,370
1952	59,103		

*The minus figure represents a net outflow.

[43] English remains a vital concern of public school administrators in Puerto Rico and elaborate programs are pursued in all grades to insure substantial familiarity with English, if not complete English literacy. See Hull, *The "English Problem,"* San Juan Review, June 1965, p. 30 and interview with Secretary of Education Quintero at p. 13 of the same publication.

[44] Migration Division, Puerto Rico Dept. of Labor, *A Summary of Facts and Figures, Puerto Rican Migration* (1964–1965 ed.) p. 15. See Hanson at 368.

[44] *A Summary of Facts and Figures, supra*, note p. 15. An earlier version of these tables was introduced in the court below (R. 73).

Puerto Rico experienced spectacular economic growth in the years following World War II, but its growing prosperity was seriously threatened by overpopulation until the effects of migration to the mainland alleviated some of the population pressure.[45] For a period, migration reduced Puerto Rico's natural population increase by as much as fifty percent.[46] Orderly migration was facilitated by the work of the Migration Division of the Department of Labor of Puerto Rico.[47] A working arrangement between the federal Department of Labor and the Puerto Rican government regarding orderly migration, at least of farm workers, was made known to Congress prior to its approval of commonwealth status for the island.[48] Although by no means planned or promoted, the migration of hundreds of thousands of Puerto Ricans

[45] See Davis, *Puerto Rico: A Crowded Island*, 285 Annals 116 (1953). Davis comments (*id.* at 119–120): "Had this outward movement not occurred, Puerto Rico's plight would have been even more difficult than it was. Emigration has helped the island not only demographically but economically, because the emigrants earn more than those who stay at home, and they send money back to the island. Furthermore, the net figures do not tell the whole story. It is well known that there is a substantial *seasonal* migration of farm labor to the mainland. In short, the island has been alleviating its demographic impasse, not at home but on the mainland." (Emphasis in the original.)

[46] *Id.* at 119.

[47] Hanson at 370–371.

[48] Testimony of Governor Munoz, Hearings on H.R. 7674 and S. 3336 before the House Committee on Public Lands, 81st Cong., 2d Sess. (vol. 3) 11 (1950).

to the mainland was a contributing factor to the achievement of economic stability on the island, a goal ardently sought by the people of Puerto Rico and one which Congressional policy was intended to facilitate."

"Migrants from Puerto Rico to the mainland have met with artificial barriers to economic and social advancement significantly more burdensome than those which confronted European migrants of earlier generations. See Handlin, *The Newcomers* (1959 Anchor ed.), chs. 3 and 4. Handlin attributes slowness in overcoming these barriers to a lack of communal organization unavoidable under the circumstances and to its by-product, individual apathy. He concludes, however:

> What has transformed apathy into involvement is the realization, or hope, that politics can be a means of effecting a fundamental improvement in their own situation. Earlier, even the Puerto Ricans who were familiar with American governmental processes were hesitant and skeptical about taking a personal part in politics. * * * Now increasingly they are persuaded that they can influence the election of office holders and that the choices they make can have genuine significance in their lives. If these people are not disillusioned by successive frustrations, this may prove a significant incentive toward organization, particularly since government plays so important a part in their daily existence. [*Id.* at 116.]

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, ETC.,

APPELLANT

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

J. LEE RANKIN,
Corporation Counsel,
Attorney for New York City Board of Elections, Appellant.

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IN THE

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October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, etc.,

APPELLANT

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

Opinions Below

The case was instituted by appellees in the District Court for the District of Columbia, seeking a declaratory judgment declaring unconstitutional Section 4(e) of the Voting Rights Act of 1965 (P.L. 89-110, 79 Stat. 439), and an injunction restraining the Attorney General of the United States from enforcement of, and the members of the Board of Elections of the City of New York, from obedience to, the Act of Congress. Said Act provides that

"[n]o person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language * * *." The statute was declared unconstitutional by a statutory three-judge court convened pursuant to 28 U. S. C. §§2282 and 2284, Circuit Judge McGowan dissenting (R. 79, 92).* The injunction was granted by formal order dated December 7, 1965 (R. 102) but was stayed pending appeal (R. 109). Officially reported, 247 F. Supp. 196.

Statement of the Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Sections 1252 and 1253.

The Notice of Appeal to the Supreme Court of the United States was filed January 5, 1966 in the United States District Court for the District of Columbia (R. 108).

Probable jurisdiction was noted January 24, 1966 upon the appeal of the New York City Board of Elections (No. 877), as well as that of the Attorney General of the United States (No. 847), and the cases were ordered consolidated (R. 110).

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* Numbers in parentheses, unless otherwise indicated are to pages of the Record on Appeal.

Constitutional Provisions and Statutes Involved

United States Constitution

Article I, §8, cl. 18:

> Section 8. The Congress shall have Power . . .
>
> . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article IV, §3 (in pertinent part):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State.

Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment, §§1, 5:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New York State Constitution

Article II, §1 (in pertinent part):

Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

United Nations Charter

Article 55 [59 Stat. 1045] (in pertinent part):

* * * the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Statutes Involved

Voting Rights Act of 1965, §4(e) [P. L. 89-110, 79 Stat. 439]:

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the pre-

dominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of an inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

New York State Election Law, §150 (in pertinent part):

* * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. * * *

Question Presented for Review

Whether the power of Congress, expressly granted by the Fourteenth Amendment, to prohibit state denial of the equal protection of the laws, extends to the basic right of suffrage and to barring state denial thereof to literate citizens of the United States, on the ground of language, where (1) it is universally recognized, i.e., by 117 nations signatory to the United Nations Charter, that denial of suffrage via language barriers constitutes unjustifiable discrimination; (2) the United States has committed itself by treaty to eliminating language barriers as conditions precedent to enjoying basic rights (U. N. Charter, Articles 55, 56), and specifically committed itself thereto in behalf of citizens from Puerto Rico, a territory under the dominion of the United States; (3) in making "all needful Rules and Regulations respecting the Territory" of Puerto Rico, the United States regulated and subsidized education in *Spanish* for its citizenry therein; and (4) the 1922 English-literacy restriction on suffrage in the N. Y. S. Constitution had its genesis in hostility to certain races and in an attempt to repress "foreign" ideas.

Statement of the Case

Appellees, registered voters in Kings County, New York, filed their complaint on August 6, 1965, seeking a judgment declaring Section 4(e) of the Voting Rights Act of 1965 unconstitutional and enjoining the Attorney General of the United States from enforcement thereof. Since the New York City Board of Elections, upon advice of the

City's Corporation Counsel, was registering citizens from Puerto Rico literate in Spanish, pursuant to §4(e), appellees sought and were permitted to amend their complaint, naming the Board as a party defendant and requesting that that defendant be restrained from obeying the challenged statute. The Board appeared generally but denied subject matter jurisdiction since it nowhere appeared from the statute that Congress intended that private citizens benefiting from a proscribed state discrimination could use the federal courts to enjoin obedience to the very Act that prohibited the discrimination. It was the Board's position that appellees' avenue of appeal to this Court was via the state courts and that the Governor could remove any local election board that refused to enforce state law in deference to a supervening federal statute.* In holding Section 4(e) unconstitutional and restraining appellant from obedience thereto, as aforenoted, challenge to the court's jurisdiction was rejected.

POINT I

Congress is expressly empowered to enforce the Equal Protection Clause which protects the suffrage rights of citizens.

As stated in *United States* v. *County Bd. of Elections of Monroe Co., N. Y.*, 248 F. Supp. 316 (D. C., W. D. N. Y.,

* Similarly, in the companion case (No. 673) of *Cardona* v. *Power et al., constituting the Board of Elections of the City of New York*, the Board entered a general denial and effectively withdrew after invoking N.Y.S. Executive Law, §71, requiring the Attorney General of N.Y. to defend State Law attacked as unconstitutional, i.e., the English literacy requirements of N.Y.S. Constitution, Art. II, Sec. 1.

1965), wherein a three-judge court unanimously upheld the constitutionality of Section 4(e), the Voting Rights Act of 1965 "represented a re-commitment by this country to the fundamental principles upon which it was founded. * * * It was devised to eliminate second-class citizenship wherever present."

Rejecting the position of the majority in the instant case—i.e., that "[t]raditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate" (R. 84)—the Court, in *Monroe County*, held that "Congress pursuant to the Fourteenth Amendment was empowered to correct what it reasonably believed to be an arbitrary state-created distinction" (248 F. Supp., at p. 321). That Court also noted (*ibid.*), that Congressional power to eliminate unreasonable discrimination and assure equal protection of the laws is expressly granted by Section 5 of the Fourteenth Amendment, citing *Ex parte Virginia*, 100 U. S. 339 (1879). In the cited case, this Court held, with respect to the Fourteenth Amendment (at pp. 345-6):

> "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view * * * and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis in original.)

See, also,

United States v. *Classic,* 313 U. S. 299, 314-316, 319-320 (1941);
Virginia v. *Rives,* 100 U. S. 313, 318 (1879).

And, as this Court noted in the same case, when Congress exercises its constitutional powers under the Fourteenth Amendment, the powers which the State might have enjoyed give way to those enactments (100 U. S., at p. 346). Further, in discussing the Equal Protection Clause of the Fourteenth Amendment, and the specific language of the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments, this Court placed special emphasis upon the fact that it is *primarily* the function of Congress, and not of the judiciary, to "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws," as follows (100 U. S., at p. 345):

> "It is not said that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged." (emphasis in original). See, *Fay* v. *New York,* 332 U. S. 261, 283 (1947); *Monroe* v. *Pape,* 365 U. S. 167, 171-2 (1961).

And the principles thus set forth in *Ex parte Virginia* in 1879 were but recently restated, and with equal emphasis, by this Court in construing those sections of the Voting Rights Act of 1965 adopted pursuant to Congressional enforcement powers under the Fifteenth Amendment (*South Carolina* v. *Katzenbach,* —— U. S. —— [1966]).

In *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), this Court again expressly stated that "[i]t is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws," and that "Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State." In short, freedom from unreasonable discrimination is one of the privileges and immunities secured by the Constitution of the United States. *United States* v. *Cruikshank, et al.*, 92 U. S. 542, 555-6 (1875). In addition, it has been expressly recognized that the "immunity from unfriendly discrimination * * * placed by the amendment under the protection of the general government and guaranteed by it" and which "may be enforced by Congress by means of appropriate legislation" (*Ex parte Virginia, supra*, at p. 345), extends to the right of suffrage and to rectifying any dilution thereof resulting from unfair state standards for apportioning state legislatures (*Reynolds* v. *Sims*, 377 U. S. 533, 566, 577, 579 [1964]), or unfair state standards for voter qualifications (*Carrington* v. *Rash*, 380 U. S. 89, 96-7 [1965]; *Louisiana* v. *United States*, 380 U. S. 145 [1965]).

While, as noted in the dissenting opinion of Justice Douglas, in *United States* v. *Classic*, 313 U. S. 299, 337 (1941), "Congress has been fairly consistent in recognizing state autonomy in the field of elections"—this cannot be deemed an abdication or abandonment of constitutional power. As this Court has previously had occasion to point out, and with respect to Congressional power under the Fourteenth Amendment, "it is only because the Congress of the United States through long habit and long years of forbearance had, in deference and respect to the States,

refrained from the exercise of these powers, that they are now doubted" (*Ex parte Yarbrough*, 110 U. S. 651, 662 [1884]). The court below, however, insisted that Congressional failure to legislate with respect to discriminatory voter qualifications in the past, "proved" that Congress had no power to do so now. Noting that the "right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States" (R. 84-85), and citing *Minor* v. *Happersett*, 21 Wall. 162, 177 (1874), the court below noted that prior to enactment of the Voting Rights Act of 1965, "whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States" (R. 88).

Thus, not only Congressional forbearance, but affirmative Congressional action in soliciting state ratification of amendments affecting suffrage requirements and qualifications, confirmed the court below in its view that "[t]his subject is one over which the Congress has no power to legislate" (R. 84). And in support of its conclusion that this applied to Congressional action dealing with state-prescribed English-literacy tests, the Court cited *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50 (1959), wherein an English-literacy test in North Carolina was held to be a reasonable voter qualification.* The Court below

* Since English was the dominant language of instruction in the educational facilities afforded the native born citizen in that case, this Court held English-literacy to be a reasonable way to promote intelligent use of the ballot (360 U. S. 45, 51-2). *Lassiter* did not involve denial of suffrage to native born citizens of the United States, educated at Federal expense in a language other than English, and state denial of suffrage regardless of whether such instruction promoted intelligent use of the ballot or not.

stated that *Lassiter* is "practically on all fours with the case at bar" (R. 86), quoting therefrom, as follows (R. 87):

> "So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315."

In *United States* v. *Classic*, 313 U. S. 299 (1941), and at p. 315, as cited by the court below from *Lassiter*, this Court stated—"[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see *Minor* v. *Happersett*; 21 Wall. 162, 170; *United States* v. *Reese*, 92 U. S. 214, 217-218; *McPherson* v. *Blacker*, 146 U. S. 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by §2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under §4 and its more general power under Article I, §8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' (cases cited)."

Referring again to Congressional power under Article I, §8, clause 18, this Court in *United States* v. *Classic*, stated (at p. 320), "Congress is given authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers

vested by this Constitution in the Government of the United States or in any department or officer thereof.' " As already noted (*supra,* pp. 8-10), this Court has clearly recognized, and expressly held, that the Equal Protection Clause protects from unreasonably discriminatory voter qualifications, and that Congress has primary responsibility under the Fourteenth Amendment to secure to all persons the equal protection of the laws. There can be little doubt, therefore, that the lower court erred in its conclusion that "[t]his subject is one over which the Congress has no power to legislate."

Nor can Congress be shorn of its powers via the lower court's suggestion that since Congress had resorted to Constitutional amendment in effecting prior restrictions "on the power of the States to prescribe qualifications for voters" (R. 87), this evidences "the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislature enactment" (R. 88). Whether Congress truly believed it lacked the power to legislate on voter qualifications, or believed that Constitutional amendment was a more appropriate, permanent and binding form of legislation, or "in deference and respect to the States, refrained from the exercise of these powers" (*Ex parte Yarbrough,* 110 U. S. 651, 662 [1884]) is irrelevant since Constitutional power cannot constitutionally be voluntarily surrendered, or lost by misconception, default or even political expediency.

Moreover, the lower Court's reliance upon Constitutional amendments (R. 87-88) barring state abridgment

or denial of suffrage "on account of race, color or previous condition of servitude" (15th Amendment—1870), "on account of sex" (19th Amendment—1920), "by reason of failure to pay any poll tax or other tax" (24th Amendment —1964), simply cannot support its conclusion that every limitation upon the power of the States to prescribe qualifications for voters must be imposed by Constitutional amendment. As noted in *Minor* v. *Happersett,* 21 Wall. 162, 176 (1874), when the Constitution was formulated and the republic first created, the right of women to vote was unknown—"this right was only bestowed upon men and not upon all of them." The same, of course, was traditionally true of disfranchised slaves, who were not even citizens. Whether it was the drastic and fundamental nature of the change effected by extending the ballot to women and to a race previously held in bondage—both of which classes had been subjected to inferior political status long before the inception of the United States—that led to Constitutional amendment as the means of expunging such long-prevailing prejudices from the common law, or the desire to make the change permanent and less easily subject to repeal, is irrelevant.*

As to recent Congressional action in eliminating, via Constitutional amendment, poll tax qualifications for voting in elections for Federal office, this Court effectively

* In contrast, the fact is, as appellees themselves pointed out in the Court below by citing Revised Record of the N. Y. S. Constitutional Convention of 1894, vol. I, pp. 287-8, the traditional practice in this country was to extend the suffrage to immigrants, no matter what language they spoke, in order to promote immigration and the consequent development of new lands, by affording new settlers an immediate stake in the political life of the country. Thus, as pointed out in the debates in the cited reference, 16 states permitted *aliens* to vote in 1894.

recognized the strength of political opposition to such action, and the consequent resort to the more difficult path of constitutional amendment. Thus, in *Harmon* v. *Forssenius,* 380 U. S. 528, 538-9 (1965), the Court said—"[p]rior to the proposal of the Twenty-fourth Amendment in 1962, federal legislation to eliminate poll taxes, either by constitutional amendment or statute, had been introduced in every Congress since 1939. The House of Representatives passed anti-poll tax bills on five occasions and the Senate twice proposed constitutional amendments." As stated in the House Report (No. 439, 89th Congress, 1st Sess., June 1, 1965) on the "Voting Rights Act of 1965," Section 10 of which effectively outlaws *via legislation* poll tax qualifications for voting in elections for state office—"[t]he action of Congress in proposing the abolition of the poll tax for Federal elections was a compromise" (at p. 22).

It is, therefore, clear that no admission can properly be exacted from Congress—on the basis of past action via Constitutional amendment barring state denial of suffrage—that Congress had itself recognized that "[t]his subject is one over which the Congress has no power to legislate" (R. 84). This is particularly true in construing federal legislation predicated upon a denial of the very proposition deemed admitted.

It is equally true that the lower court improperly departed from firmly established law recognizing Congressional power under the Fourteenth Amendment to remove unreasonable barriers to basic rights of citizenship.

POINT II

Congress has power under the Fourteenth Amendment to remove suffrage barriers violative of universally recognized standards to which the Nation has pledged itself, which resulted from hostility to certain nationalities and races, and which clash with specific national commitments.

a. Language barriers to the right of suffrage may properly be held to constitute unjustifiable discrimination.

The concern of Congress to secure the suffrage rights of all citizens free of discriminatory state legislation is clearly noted in the 1959 Report of the U. S. Commission on Civil Rights (abridged—p. 9)—"In the assignment of this Commission, Congress indicated that its first concern is with the rights of citizens to vote and the right of all persons to equal protection of the laws. These rights are the very foundation of this Republic."

By 1963, that Commission recommended "the enactment by Congress of some form of uniform voter qualification standards" as the "only effective method of guaranteeing the vote for all Americans" (Report of U. S. Commission on Civil Rights, 1963, "Recommendations," pp. 27-28). This recommendation was not, however, adopted by Congress in the enactment of Section 4(e) of the Voting Rights Act of 1965. That section does not represent direct and primary legislation fixing standards of voter qualifications for all the states. It is, instead, remedial legislation correcting the unjustifiable exclusion, from basic

rights of suffrage, of native-born citizens educated in their mother tongue under the Government of the United States. As will be shown, such exclusion from the ballot on grounds of language, and despite literacy and intelligence, violates universally accepted standards subscribed to by all member nations of the United Nations, placed the United States in violation of its pledge under the Charter to promote observance of "fundamental freedoms for all without distinction as to race, sex, language or religion," and violated international obligations specifically undertaken by the United States with respect to its citizens from Puerto Rico.

In *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 51 (1959), this Court upheld a North Carolina English literacy requirement that had none of the invidious objectives historically rooted in N. Y. S. Constitution, Art. II, §1 (*infra*, pp. 22-25), and which was not shown to affect substantial numbers of United States citizens literate in the language and culture of that section of United States territory in which they were born. The majority's statement that *Lassiter* "is practically on all fours with the case at bar" (R. 86), ignores the fact that the *primary* responsibility for investigating and eliminating unreasonable discriminatory practices affecting suffrage rights, rests with Congress under the Fourteenth Amendment, and not with the courts. Moreover, it overlooks the fact that the thrust of *Lassiter* was that "literacy has some relation to standards designed to promote intelligent use of the ballot" (at p. 51), and not that English-literacy has some relation to promoting intelligent use of the ballot where the dominant language of instruction for native-born and

literate citizens of the United States is other than English and where mass media of communications in such language assure as intelligent use of the ballot as would English-literacy (R. 50-71).*

In the very year in which *Lassiter* was decided, moreover, the United States Commission on Civil Rights reported to the Congress that "this Commission has found that Puerto Rican American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York" (1959 Report of U. S. Comm. on Civil Rights, abridged version, p. 58). The very purpose of the Commission's "existence is to find facts which may subsequently be used as the basis for legislative or executive action" (*Hannah* v. *Larche*, 363 U. S. 420, 441 [1960]).

Where Congress bears *primary* responsibility for enforcing Constitutional requirements, it is for Congress "to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U. S. 63, 67 (1965). It was the duty of Congress, therefore, to investigate and

* The New York courts have previously upheld the constitutionality of New York's literacy requirement. *Camacho* v. *Doe*, 31 Misc. 2d 692 (S. Ct., Bx. Co., 1958), aff'd without opinion, 7 NY 2d 762 (1959). On the authority of *Camacho* v. *Doe*, 7 NY 2d 762 (1959), the New York English-literacy requirement was upheld in *Camacho* v. *Rogers*, 199 F. Supp. 155 (S. D. N. Y., 1961), although the Court acknowledged that Spanish newspapers in New York are fully informative on state and local political affairs. However, in *Matter of Cardona* v. *Power*, 16 NY 2d 639, 640-1 (1965), "New York State's literacy-in-English requirements" were found to be "unreasonable and unconstitutionally discriminatory" by Chief Judge Desmond, dissenting with Fuld and Burke, JJ., when applied to a "competent, intelligent and reasonably well-educated and informed native-born American citizen."

cull conclusions about the relationship of "tests and devices," "literacy tests," extent of registration and voting, state discrimination denying "perfect equality of civil rights and the equal protection of the laws" (*Ex parte Virginia, supra,* at pp. 345-6)—and to correlate its findings with universally recognized standards of fair and reasonable limitations on the right of suffrage. "As this Court has stressed on numerous occasions, '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' *Reynolds* v. *Sims,* 377 U. S. 533, 555. The right is fundamental 'because preservative of all rights'. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370" (*Harmon* v. *Forssenius,* 380 U. S. 528, 537 [1965]). That Congress could regard state language barriers as unjustifiably discriminatory and a proper subject for the exercise of its powers under the Fourteenth Amendment is readily apparent.

Thus, as stated in a *"Study of Discrimination in the Matter of Political Rights"* (1962), a study conducted by the United Nations Commission on Human Rights and the Economic and Social Council (Sub-Commission on Prevention of Discrimination and Protection of Minorities), "the development of modern methods of mass communication such as radio and television" has negated the rationale commonly advanced in justification of literacy tests, namely, that only a person who can read and write can keep abreast of public affairs and vote intelligently (at p. 32). The "fact is that where literacy tests subsist they have in many cases been maintained as a device for eliminating, or at least discouraging, prospective voters belonging to particular

elements of the population" (*ibid.*). And, "when citizens of a country are denied the right to vote because they cannot pass a literacy test in a language which is not their mother tongue, this may be deemed discrimination" (*ibid.*, p. 33). "Restrictions of this nature are even more unjustifiable when applied to nationals by birth who have lived in one part or territory of a country, where they have been educated in a particular language, and have moved to another part or territory where a different language is officially recognized" (*ibid.*).

As stated in the 1959 Report of the United States Commission on Civil Rights (abridged version—p. 90)—with respect to State discriminatory practices which disfranchise citizens of the United States—"There exists here a striking gap between our principles and our everyday practices. This is a moral gap. It spills over into and vitiates other areas of our society. It runs counter to our traditional concepts of fair play. It is a partial repudiation of our faith in the democratic system. It undermines the moral suasion of our national stand in international affairs."

The United States has, in fact, bound itself by international treaty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (U. N. Charter, Arts. 55-56; 58 Stat. 1045). As stated with respect thereto, by Mr. Justice BLACK, concurring in *Oyama* v. *California*, 332 U. S. 633, 649-50 (1948)—"How can this nation be faithful to this international pledge if state laws" running directly counter thereto "are permitted

to be enforced?" No state that defies universally recognized standards for safeguarding fundamental rights for all classes of the citizenry, inclusive of the right of suffrage, and fashions standards that directly conflict therewith, can avoid discrimination violative of the Equal Protection Clause even in the absence of Congressional action in enforcement of an international obligation to observe such universally accepted standards regarding permissible barriers to the basic right of suffrage. See, *Sei Fujii* v. *State,* 242 P. 2d 617, 621-2 (S. Ct., Cal., 1952), where it is noted that the provisions of Article 55, while not self-executing, were "framed as a promise of future action by the member nations."

Thus, it is clear that Congress could properly regard state erected language barriers to the basic right of suffrage as unjustifiably discriminatory and a proper subject for the exercise of its powers under the Fourteenth Amendment. Needless to say, all of the substantive powers of Congress are to be considered together in passing upon constitutionality. *Legal Tender Cases,* 12 Wall. 457, 532 (1872); *United States* v. *Constantine,* 296 U. S. 287, 294 (1935); *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 363 (1941).

b. Article II, Sec. 1 of the N. Y. S. Constitution had its genesis in hostility towards certain nationalities and races.

That Congressional action in *partially* mitigating the unconstitutionally discriminatory effect of New York's literacy test is long overdue, may be readily demonstrated. Thus, the New York State constitutional provision (Art. II, §1) disfranchising all citizens unable "to read and write English" was expressly intended to effect discrimination against certain nationalities and races based on hostility to those nationalities and races. This was flatly admitted by the original sponsor of such constitutional amendment, Charles H. Young, who first proposed it at the New York State Constitutional Convention of 1915, as follows:

> "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races. * * * The danger has begun * * *. We should check it * * *."
>
> (3 N. Y. S. Constitutional Convention 3010, Revised Record 1916; see, pp. 3015-17, 3021-55; see, also, Debate on the Literacy Test, N. Y. Times, Section 7, p. 2, Oct. 23, 1921).*

* This background concerning the inception of New York's English-literacy requirement was placed before Congress. See, "Literacy Tests and Voter Requirements in Federal and State Elections—1962", p. 511, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 87th Congress, 2d Sess., pp. 274, 301-315, 500-513; "Voting Rights—1965", Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Rep., 89th Cong., 1st Sess., pp. 508-520.

It was not, however, until 1921—during a postwar period that expressed its hostility to certain races, nationalities and beliefs, via many repressive measures and deprivations of civil rights, leading Charles Evans Hughes to question "whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged" (CHAFFEE, *Free Speech in the United States*, p. 102 [1948]; see, also, pp. 237, 278-9, 590-1)—that Mr. Young's proposed literacy requirement was adopted. Thus, even if Congress lacked the primary power to prohibit, restrict or abate discriminatory denial of voting rights and of equal protection of the laws—powers expressly granted to Congress by the Fourteenth Amendment—the intent and motivation of state legislation and its actual effect are important fields of inquiry in determining whether state action is constitutional. *Harmon* v. *Forssenius*, 380 U. S. 528, 543 (1965); *Reynolds* v. *Sims*, 377 U. S. 533, 561 (1964); *Oyama* v. *California*, 332 U. S. 633, 646, 651 (1948); see, *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556-7 (1946); *Davis* v. *Schnell*, 81 F. Supp. 872, 879-80 (S. D. Ala., 1949); aff'd 336 U. S. 933 (1950). And this is particularly so where the most fundamental right, "preservative of all rights," is concerned.

It is equally clear from the historical background of Article II, §1 of the New York State Constitution, that thought-control in the form of barring "foreign" ideas was at the very heart of New York's literacy-in-English requirements aimed at nationalities and races which the Legislature of the State deemed inferior. Needless to say, the fact that huge numbers of immigrants from poverty-stricken areas of Southern and Eastern Europe sought

employment and settled in large metropolitan centers, such as the City of New York, and could not achieve the required literacy in English, served admirably to retain legislative power in rural areas by disfranchising citizens who could not thus achieve "the mental qualities of our race," to use the language of Mr. Young. However, hostility to races and nationalities, to "foreign" ideas, to the electoral strength of populous urban centers and to the "danger" implicit therein, are not legally sufficient props to support state classifications of citizens of the United States for purposes of enfranchising some and disfranchising others.* As this Court recently stated with respect to state-imposed qualifications for voting (*Carrington* v. *Rash*, 380 U. S. 89, 90 [1965]):

> "But the fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. 'The courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*.'" (Emphasis added.)

State classifications *affecting civil rights* are on a fundamentally different footing, insofar as the Equal Protection Clause is concerned, from classifications in other fields (*Reynolds* v. *Sims*, 377 U. S. 533, 561 [1964]; *Schneider* v. *State*, 308 U. S. 147, 161 [1940]; *Guinn* v. *United States*, 238 U. S. 347, 366 [1915]). And different standards apply

* Insofar as a literacy-in-English requirement encourages citizens to read and write English, it is clearly commendable, but this laudable purpose may not be effected by withholding from citizens those basic rights, derivative of all rights, which the Constitution of the United States guarantees. *Meyer* v. *Nebraska*, 262 U. S. 390, 401 (1923); *Thomas* v. *Collins*, 323 U. S. 516, 529-30 (1945); *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1, 17-18 (1964).

to presumptions in favor of State classifications when they affect rights of suffrage, "rights so vital to the maintenance of democratic institutions" (*ibid.*, see, also, *Morey* v. *Doud*, 354 U. S. 457, 471 [1957]).

Thus, where "history has seen a continuing expansion of the scope of the right of suffrage in this country" (*Reynolds* v. *Sims*, 377 U. S. 533, 555 [1963]), Congress may properly view with concern such regressive action, via language barriers erected in the State of New York under the circumstances above outlined, especially where they ignore both universally recognized standards to which this Nation is committed, and as will be shown, specific commitments of the United States with particular regard to citizens from Puerto Rico. That Congress may take corrective action under the Equal Protection Clause against state enactments which operate to deny equal treatment affecting fundamental rights of citizenship has been recognized for almost a hundred years. See, *Civil Rights Cases*, 109 U. S. 3, 13-14 (1883), and cases cited *supra*, pp. 8-10.

POINT III

Under Art. IV, §3, Congress may constitutionally prevent a state from effectively ignoring the policy of, and international obligations undertaken by, the United States with respect to citizens of Puerto Rico.

Reviewing the policy of the United States with respect to Puerto Rico, the dissenting opinion herein, by Circuit Judge McGowan, points out that that policy had always been to afford the People of Puerto Rico "a true option to preserve and extend a cultural tradition as venerable

as our own" (R. 94-95), and that this was, in part, accomplished by financing education in Spanish as the dominant language of instruction (R. 97-98). With respect to that policy, the dissent observes that Congress has established "a tradition of enlightened treatment of Puerto Rico which is currently one of the firmest props of our pretensions to a respectful hearing in the councils of the world. Section 4(e) of the Voting Rights Act of 1965 is but the latest Legislative act in this tradition" (R. 95).

Tracing the historical development of Puerto Rico as a part of United States territory, the Circuit Judge notes (R. 92 fn.) that "Puerto Rico came under American rule by virtue of the Treaty of Paris of 1899, ending the Spanish-American War. That treaty provided, among other things, that 'the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by Congress.' 30 Stat. 1754, at 1759," and that Congress has broad "power to 'make all needful Rules and Regulations' in respect to the territories" (U. S. Const. Art. IV, §3), citing, *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 674 (1945); *Public Utility Comm'rs* v. *Yuchausti & Co.,* 251 U. S. 401, 406 (1920); *Binns* v. *United States,* 194 U. S. 486, 491 (1904); *Hawaii* v. *Mankichi,* 190 U. S. 197, 218 (1903); *Rabang* v. *Boyd,* 353 U. S. 427, 432 (1957). The opinion further notes (R. 97), citing *Balzac* v. *Porto Rico,* 258 U. S. 298, 311 (1922), that "The Jones Act in 1917 gave American citizenship to all Puerto Ricans, and permitted them free entry into this country."

By 1952, however, in order to secure exemption from United Nations control over Puerto Rico as "colonial territory" of the United States, pursuant to Article 73(e)

of Chapter XI of the United Nation's Charter, it was necessary to assure the United Nations, among other things, that Puerto Ricans are not subject to having any dominant language impressed upon them as a condition to enjoying basic rights of citizenship. This was to preclude possible classification of Puerto Rico as a territory subject to the International Trusteeship System of the United Nations which System was designed to effectuate "self-government or independence" (Charter, Chap. XII, Articles 75-76).

Thus, the "Memorandum by the Government of the United States, etc.", submitted to the United Nations on March 21, 1953, states that the people of Puerto Rico have enjoyed "universal adult suffrage since 1939. There have been no property requirements since 1906 and the last literacy requirements were removed in 1935" (see, *U. S. Participation in the U. N.*, Report by the President to the Congress for the year 1953, pp. 181 *et seq.;* and 28 Dept. State Bulletin 587). The United States' commitment to the United Nations also states that "the Constitution of the Commonwealth (of Puerto Rico) is similar to that of a State of the Federal Union," and that the "people of Puerto Rico continue to be citizens of the United States as well as Puerto Rico and the fundamental provisions of the Constitution of the United States continue to be applicable to Puerto Rico" (*ibid.*).

On the strength of the United States' commitment above delineated, the General Assembly adopted a Resolution declaring Chapter XI of the Charter inapplicable to Puerto Rico (*id.*). In short, observance of the basic requirement of the U. N. Charter, to promote "universal respect for, and observance of fundamental freedoms for all without distinc-

tion as to race, sex, language or religion" was thus undertaken by the United States with specific reference to citizens from Puerto Rico. In exercising its power under Art. IV, §3, Congress can validly consider the standards to which the Nation had subscribed in its international agreements. Under the Supremacy clause (Art. VI, cl. 2), any state suffrage requirement based on language must yield to specific Congressional enactment insofar as such suffrage requirement affects citizens from Puerto Rico, educated under the Territorial powers of the United States, and with respect of whom specific international obligations have been undertaken by the United States to the effect that no dominant language will be impressed upon such persons as a condition to enjoying the fundamental freedoms referred to in the Charter. *Slaughter-House Cases,* 16 Wall. 36, 71, 77-79 (1873); *Crandall* v. *Nevada,* 6 Wall. 35 (1868); *Tennessee* v. *Davis,* 100 U. S. 257, 263 (1879).

In short, and as stated by the three-judge Court in the *Monroe County* case, "Congress acted well within its constitutional limits when it legislated to prevent New York from prohibiting or, at the very least, substantially impeding the integration of Puerto Rican emigrants into its political life through the imposition of an English language requirement for voter registration."

CONCLUSION

1. Protection of suffrage rights is a valid subject of Congressional action under the Fourteenth Amendment;

2. In legislating to enforce rights under the Fourteenth Amendment, Congress could consider the standards estab-

lished by international treaty, as well as the history of hostility to certain nationalities which led to adoption of Art. II, §1 of the New York State Constitution;

3. In exercising its broad power to make rules and regulations for territories, Congress could protect suffrage rights against state infringement and could validly consider the standards established by treaty obligation.

The order appealed from should, therefore, be reversed and Section 4 (e) of the Voting Rights Act of 1965 declared a valid enactment.

March 11, 1966.

Respectfully submitted,

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JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

Nos. 847-877

NICHOLAS deB. KATZENBACH, *et al.*,

Appellants,

v.

JOHN P. MORGAN and CHRISTINE MORGAN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

Nos. 847-877

NICHOLAS DEB. KATZENBACH, *et al.*,

Appellants,

v.

JOHN P. MORGAN and CHRISTINE MORGAN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Statement of the Case

This case was an action brought by plaintiffs-appellees, voters in New York City, against defendant-appellant, as Attorney-General of the United States, for a declaratory judgment that Section 4(e) of the Voting Rights Act of 1965 was unconstitutional, and for an injunction restraining defendant from enforcing the statute. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2282, 2284, and the Court held that the aforesaid Act of Congress was unconstitutional. The opinion is not yet reported. This appeal is from that decision.

Question Presented

Whether Section 4(e) of the Voting Rights Act of 1965 is within Congress' constitutional power to enact.

Summary of Argument

Plaintiff voters have standing to contest the constitutionality of the statute because their vote is being diluted through the influx of persons not permitted to vote under state law. Section 4(e) is based on the Fourteenth Amendment. However, as the Fourteenth Amendment does not forbid the states from imposing English-language literacy tests, Congress has no power to pass the statute. The Fourteenth Amendment has nothing to do with the right to vote, but even if it did, an English-language literacy test is reasonable thereunder. Moreover, the distinction between a voter educated in a foreign language school under the American flag and one under a foreign flag is itself arbitrary and violates the Fifth Amendment.

Nor can the statute be upheld under Congress' power to govern the territories. The statute covers schools in all of the states. Even applying it only to Puerto Rico, it controls voting qualifications in the states and not merely in the territories. In this connection, the reasons given by the New York senators who sponsored the proviso is invalid because the treaty on which they rely cannot overcome Congress' constitutional limitations. Finally, ignorance is not a privilege of national citizenship protected by Art. 4, Sec. 2, or the Fourteenth Amendment.

POINT I

The Plaintiff Voters Have Standing to Sue.

A. By Common Law

The Fifth Amendment, enacted in 1791, forbids Congress from taking "liberty" or "property" without due process of law. The Ninth Amendment reserves to the people sundry "rights" not enumerated in the first eight amendments. To determine the meaning of these terms, it is necessary to resort to English common law regarding the right to vote.

Originally, when the electorate was small, the franchise, or "freedom" of a city, was looked on as in the nature of a property right held in common with other electors. *Bagg's Case,* 11 Co. Rep. 93b, 98b, 77 Eng. Rep. 1271, 1278 (1615) holds:

> "when a man is a freeman of a city or borough, he has a freehold in his freedom for life, and with others in their politic capacity, has an inheritance in the lands of the corporation, an interest in their goods, and perhaps it concerns his trade and means of living, and his credit and estimation. . . ."

Only freemen of a borough could vote. *Schuldam* v. *Bunniss,* 1 Cowp. 192, 98 Eng. Rep. 1038 (1774). The franchise, or freedom of a corporation, was deemed a privilege, and not a public office or position. *R.* v. *Morris,* 1 Ld. Raym. 337, 91 Eng. Rep. 1121 (1698). Thus, the nature of an elective franchise under common law as a lifetime property right was clearly shown in *Commins* v. *Oakhampton Corp.,* Sayer 45, 96 Eng. Rep. 797 (1752). Here, the Court of King's Bench specifically held that "the freedom of a

corporation not being transmissible," a father could not inherit it from his son and hence his interest therein did not bar him from testifying on behalf of his son's right to vote. Significantly, the Court further held:

> "It was . . . clearly against the interest of the father, who was himself a freeman, . . . [to allow the son to vote]; for, by the establishment of a custom, under which others as well as his son might obtain their freedom, his own franchise would have been rendered less valuable."

Under common law, only a franchise-holder could sue to prevent another person from unlawfully exercising the franchise; the municipality had no standing to bring the suit. See: *Winton Corp.* v. *Wilks,* 1 Salk. 203, 91 Eng. Rep. 181 (1703); *Wilmott* v. *Nixon,* 1 Lev. 262, 83 Eng. Rep. 398 (1668). Hence, at an early time, it became the uniform rule that no person could challenge a vote cast by another at an election unless he himself was a voter or a candidate. In *Caermarthenshire Case,* 1 Peck. 286, 298 (1803), it was observed:

> "before the St. 10 Geo. 3 [Ch. 16, 1770] under the ancient system, and according to the general practice of the house [of Commons of England], no petition against an undue election was presented except by electors, or candidates; by the St. 10 Geo. 3, (it being wished as much as possible to limit the discretion of the house) *every* petition complaining of an undue election and return was directed to be referred to a select committee; of course, it could then no longer be made an objection to receiving a petition, that it was not the petition of an elector or a candidate; the

St. 28 Geo. 3, [c. 52, §1, 1788], to introduce again the former practice, which was found, by the interruption of it, to have been very convenient, enacted that no petition should be received, except signed as therein mentioned."

The uniform rule in England has thus been that a voter was entitled to challenge the right to vote of another voter. Among the many cases which might be referred to are the following:

Oakhampton Case, 1 Fras. 69 (1791);
Boston Case, 1 Peck. 434 (1803);
Caermarthenshire Case, 1 Peck. 286, 289-290 (1803);
Pruen v. *Cox,* 2 C.B. 1, 135 Eng. Rep. 839 (1845);
Toms v. *Cumming,* 7 Man. & G. 88, 135 Eng. Rep. 38 (1845);
Knowles v. *Brooking,* 2 C.B. 226, 135 Eng. Rep. 931 (1846);
Breelen v. *Hockin,* 4 C.B. 19, 136 Eng. Rep. 407 (1846);
Woollett v. *Davis,* 4 C.B. 115, 136 Eng. Rep. 446 (1847);
Melbourne v. *Greenfield,* 7 C.B. (n.s.) 1, 141 Eng. Rep. 713 (1859);
Smith v. *James,* L.R. 1 C.P. 138 (1865);
Jones v. *Jones,* L.R. 1 C.P. 140 (1865);
Smith v. *Holloway,* L.R. 1 C.P. 145 (1865);
Pease v. *Middleborough Town Clerk,* [1893] 1 Q.R. 127;
See also *Barr* v. *Chambers,* 22 L.R. Ire. R. 264 (1887);
Re *South Fredericksburgh Voters' List,* 15 Ont. L.R. 308 (1907).

In Halsbury's Laws of England, Elections, 28-29 (3rd ed. 1956), it is stated: "An objection [to registration for voting] can only be made by a person appearing from the electors lists to be himself entitled to be registered."

Since under English common law the franchise was a valuable right which a voter could protect from dilution by unqualified voters, the Fifth and Ninth Amendments to the United States Constitution protects the same right against acts of Congress. Hence, a voter has standing to sue to protect such right.

B. Under New York Law

McKinney's New York Election Law, §171 (1), provides as follows: "Any person who applies . . . for registration . . . for any election may be challenged by any qualified voter . . . " Section 331 (1) provides: "The supreme court or a justice thereof . . . in a proceeding instituted by any voter duly qualified to vote in this state . . . shall, by order, direct to be stricken from the register any name unlawfully thereon. . . . "

The right of a voter to sue to remove the name of an unqualified person on the electoral rolls is by no means unique to New York. See *State ex rel. Bowden* v. *Fontenot*, 132 La. 481, 61 So. 534 (1913); *City of Baltimore* v. *Fledderman*, 67 Md. 161, 8 Atl. 758 (1887). Apparently, this is also the rule in the District of Columbia. See *Arrison* v. *Cook*, 6 Dist. Col. 335 (1868). Where a voter sues to disqualify another purported voter from voting, on constitutional grounds, this raises a "case" or "controversy" which the U.S. Supreme Court may adjudicate on the merits. *Leser* v. *Garnett*, 139 Md. 46, 114 Atl. 840 (1921), *aff'd* 258 U.S. 130, 136 (1922). Hence a voter has a suffi-

cient interest to prevent dilution of his vote to have standing to sue. *Gray* v. *Sanders*, 372 U.S. 368, 375 (1963). See also *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Crampton* v. *Zabriskie*, 101 U.S. 601 (1880).

POINT II

Section 4(e) of the Voting Rights Act of 1965 Violates the Fifth, Ninth and Tenth Amendments to the United States Constitution.

Before passage of the 14th Amendment, it was settled law that the States had exclusive control over the qualifications for voting. *Spragins* v. *Houghton*, 3 Ill. 377, 395-6 (1840); *Huber* v. *Reily*, 53 Pa. St. 112, 115-6 (1866). If at that time, Congress had attempted to usurp control over voting qualifications by adding electors to the rolls in violation of state law, such federal statute would have violated the Tenth Amendment by infringing on powers reserved to the states. It would also have violated the Fifth and Ninth Amendments by diluting unlawfully the votes of voters qualified by state law and thereby infringing on their common-law rights and state-created interests without due process of law and in violation of the reserved common-law rights protected by the Ninth Amendment.

However, in Section 4(e) of the Voting Rights Act of 1965, Congress contended that the Fourteenth Amendment gave it power to set voting qualifications. This is contrary to all the contemporary as well as present-day case law. See: *McKay* v. *Campbell*, 16 Fed. Cas. 157, 160 (No. 8839) (D. Ore. 1870); *Lassiter* v. *Northampton Co. Bd. of Elec-*

tions, 360 U.S. 45 (1959). No cases have held that Congress has power to set voting qualifications under the Fourteenth Amendment.

Moreover, the legislative history of the Fourteenth Amendment in the debates on it in Congress in 1866 show clearly that the Fourteenth Amendment was not intended to cover suffrage (voting qualifications). In the appendix hereto we have duplicated the relevant portions of the legislative history of the Fourteenth Amendment with this set forth explicitly therein. Congress derives no power over literacy tests required by states of voters, or other voting qualifications, from the Fourteenth Amendment.

Moreover, when the 15th Amendment was proposed, various proposals were made to ban denial of the right to vote based on education, property, intelligence, etc. Several of these proposals, and the reasons for the same, are set forth in the appendix. All of these proposals failed and the only thing enacted was a prohibition based on denial of voting due to race, color, or previous condition of servitude. Obviously, there would have been no need to forbid denial of the right to vote based on educational qualifications as part of the 15th Amendment if Congress already had power to forbid this under the 14th Amendment. In 1866 and 1869 Congress failed to restrict the States in their use of literacy tests or other means by which suffrage could be restricted, in the Civil War constitutional amendments. Now Congress wants an encore by mere statute. Such encore is clearly in excess of its power, since the power to enforce the 14th Amendment given in the Fifth Section thereof does not include the power to amend the 14th Amendment by statute. And the Supremacy Clause of the Constitution (Art. VI) makes federal statutes the

"supreme law of the land" only when these statutes are made in "pursuance" of the Constitution. When made contrary to the Constitution they are invalid and impose no duties nor confer any rights.

POINT III

A. An English-Language Literacy Test Is Not Unreasonable Under the Fourteenth Amendment.

It is hornbook law that a State has the power, under the Constitution, to establish and maintain qualifications as a prerequisite to voting, *provided only* that such qualifications are not based on race, color, or previous condition of servitude.

Barring such unconstitutional discrimination, New York State clearly has the authority to require certain literacy standards of her citizens before allowing them to participate in the electoral process. See *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 43 (1959).

That one such literacy standard could be a requirement that any prospective voter be able to speak the English language was upheld in *Camacho* v. *Rogers,* 199 F. Supp. 156 (S.D.N.Y. 1961).

The Fourteenth Amendment is offended "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425-6 (1961). Given a valid objective, "State legislatures *are presumed* to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan, supra.*

If any state of facts *may be conceived* to justify a statutory discrimination, this Honorable Court is without au-

thority to set aside such a statute. See *Kotch* v. *Board of Fiver Port Pilot Com'rs.*, 330 U.S. 552; *Metropolitan Casualty Ins. Co. of New York* v. *Bromnell*, 294 U.S. 580; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Atchison, T. & S.F. R. Co.* v. *Matthews*, 174 U.S. 96.

It will take little effort for this Honorable Court to conclude that the State of New York, in enacting the law under attack here, is properly carrying out a legitimate governmental obligation and purpose in requiring all her citizens to be able to speak the English language before participating in the electoral process. Such a requirement speeds up the process of the assimilation of large numbers of foreign speaking citizens into the mainstream of New York and American life, in order that they may properly assume the responsibilities of citizenship that accompany the privileges of citizenship.

Plaintiffs contend that a careful scrutiny of the applicable New York law will convince this Honorable Court that the State of New York, in enacting such a statute, is well within the bounds of exercising a legitimate governmental objective, and that such classification does not constitute an unreasonable classification, under the Fourteenth Amendment standards, even if they covered voting.

B. Even If the Fourteenth Amendment Covered Suffrage, Which It Does Not, Section 4(e) Would Still Be Unconstitutional.

It is obvious that states must, in the very nature of things, make various restrictions and qualifications on the right to vote. It cannot let children of five years of age vote; it cannot let lunatics vote; and various other examples come readily to mind. All cases having passed on the point have

held that imposition of an English-language literacy test is not violative of the 14th Amendment. *Lassiter* v. *Northampton Co. Bd. of Elections*, 360 U.S. 45 (1959); *Camacho* v. *Rogers*, 199 F. Supp. 156 (S.D.N.Y. 1961); *Camacho* v. *Doe*, 31 Misc. 2d 692, 221 N.Y.S. 2d 262 (1958), *aff'd* 7 N.Y. 2d 762, 194 N.Y.S. 2d 33, 163 N.E. 2d 140 (1959). It is entirely reasonable for New York State to require that voters know the English language, since most material about politics and government in New York State is in English only. The fact that something is to be found in Spanish does not detract from the reasonable nature of the restriction, as the above cases have pointed out. Hence, Congress is, as noted above, not enforcing the 14th Amendment, but rather amending it, in abolishing the English language requirement.

Indeed, Congress itself has recognized the close connection between knowledge of English and participation in American civic and political life. In the basic naturalization statute, it provided:

> "No person . . . shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate— (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . ." 8 U.S.C. §1423.

None of the cases which have passed on this section have even questioned its constitutionality. See *Petition of Contreras*, 100 F. Supp. 419 (S.D.N.Y. 1951); *In re Swenson*, 61 F. Supp. 376 (D. Ore. 1945); *U. S.* v. *Bergmann*, 47 F. Supp. 765, 766 (S.D. Cal. 1942); *Petition of Katz*, 21 F. 2d 867 (D.C. Mich. 1927). Yet the Fifth Amendment pro-

tects against unjustified discrimination between naturalized and native-born citizens, who are in all respects to be treated equally. *Schneider* v. *Rusk*, 377 U.S. 163 (1964). If this classification were to be considered unreasonable, then the federal naturalization law would be unconstitutional. The fact that it is still on the books shows that knowledge of English does not have a reasonable relation to the duties of citizenship and the right to vote.

The Department of Justice introduced a large number of affidavits below to show that there were Spanish-language newspapers, political pamphlets, and other sources of information printed in New York, but it could not refute plaintiffs' material showing that there is a great deal more material about government and politics printed in English. On the federal level, the Congressional Record immediately comes to mind. Moreover, in small upstate towns in New York there are no Spanish-language publications, as there are in New York City. Hence the New York law is a reasonable regulation, even giving full weight to the Department's evidence of the availability of some Spanish-language material.

It may also be noted that, assuming contrary to fact that the Fourteenth Amendment covers voting, even if it be contended that a state could reasonably let foreign-language residents vote, as long as it is also a reasonable choice not to let them vote, then the Fourteenth Amendment is not violated, because the primary control of voting qualifications is in the states, and Congress can only enforce the Fourteenth Amendment—not amend it. The editorials annexed to the appendix show that the English-language literacy test is reasonable.

POINT IV

The Irrational Distinction Between Education in "American-Flag" and Other Schools in Section 4(e) Violates the Fifth Amendment.

It is settled law that the Fifth Amendment protects against "unjustified" discrimination or distinctions. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In the Voting Rights Act of 1965, Sec. 4(e), Congress has provided that a citizen who has learned Spanish in Puerto Rican schools may vote in the New York City municipal elections notwithstanding the fact that he cannot read English. However, a citizen who has learned just as much Spanish in Mexico or some other country cannot vote in New York City without knowing English. This is not in any way unlikely since babies born to aliens in the United States who are then taken by their parents abroad and educated there remain citizens although they cannot speak a word of English. See *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898); *Perkins* v. *Elg*, 307 U.S. 425 (1939). If they should then come back to vote they cannot do so, which natives of Puerto Rico can do. Whereas a Puerto Rican may know more about the federal government from his schooling than an American educated abroad, surely he does not know more about the New York City municipal election. Hence this distinction is completely irrational as far as municipal elections are concerned, and being so, the federal law is invalid for making an arbitrary distinction.

POINT V

The Power to Govern the Territories Does Not Extend to the Right to Govern the States.

The first sentence of the Fourteenth Amendment (Sec. 1), provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Hence, a Puerto Rican who moves to New York becomes a citizen of New York, and at that point Congress has no further general power to grant him rights, other than those privileges and immunities of national citizenship which do not, as shown by the legislative history of the Fourteenth Amendment, include voting rights.

Judge McGowan below based his dissent on Art. 4, Sec. 3, cl. 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

The concept of disposing of territory and ruling it are co-extensive. *United States* v. *Gratiot,* 14 Pet. 526, 537 (1840). Congress can sell a territory or grant it independence by statute; it cannot deal with a state in this way. Congress cannot sell New York State and it cannot make New York an independent nation. The power to govern territory extends only to the right to govern people while in that territory. When they become citizens of another state by physically moving they remove themselves both from the rights and the duties imposed by the governing power of

the place of their former residence. Congress can no more give Puerto Ricans the right to vote in New York than can New Jersey give Jerseyites the right to do so. The presence of the Supremacy Clause is no more relevant in the case of Puerto Ricans than is the Full Faith and Credit Clause relevant in the case of residents moving from New Jersey. Neither clause creates substantive constitutional power; both bind the states to respect the exercise of existing power.

In *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542 (1828), Chief Justice John Marshall observed:

> "This treaty [of Spain ceding Florida] is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. . . . They do not, however, participate in political power; they do not share in the government till Florida shall become a State."

In *Pollard's Lessee* v. *Hagan,* 3 Howard 212, 224 (1844), this Court held that "no such power [municipal sovereignty] can be exercised by the United States within a State." Moreover, no treaty can alter this. In the foregoing case, this Court observed:

> "It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it." *Id.* at p. 225.

In *Permoli* v. *New Orleans*, 3 How. 589, 610 (1844), this Court held that all "the laws of congress [governing Orleans Territory] were all superseded by the state constitution" when Louisiana became a state, and it must follow that a citizen of a territory likewise removes himself from the benefit of territorial laws when he moves to a state. See also *Benner* v. *Porter*, 9 How. 235, 242 (1850).

The problem here under consideration was specifically dealt with by Mr. Chief Justice Taney in *Strader* v. *Graham*, 10 How. 92, 94 (1850), where he said:

> "For the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, . . ."

In *Murphy* v. *Ramsey*, 114 U.S. 15, 44-45 (1885), this Court drew a sharp distinction between the right to vote in the states and the right to vote in the territories, saying:

> "The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants

of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

It follows from the foregoing that Congress' constitutional power to confer the right to vote on citizens of territories is limited to voting in those territories, and not in the states.

POINT VI

The Reasons Given for the Constitutionality of the Statute by Senators Javits and Kennedy (N.Y.) Are Without Legal Foundation.

The debate on Sec. 4(e) of the federal statute will be found in the Congressional Record, Senate, for May 20, 1965, pages 10675-10690. In addition, Senator Robert Kennedy, when Attorney-General, on April 10, 1962, in testimony before the Senate Subcommittee on Constitutional Rights, of the Judiciary Committee, also discussed this proposed statute. The gist of the defense of the constitutionality of this statute by the two New York Senators is based on three grounds:

(1) Art. IV, Sec. 3, clause 2, of the Constitution giving Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States";

(2) implied power allegedly existing to protect wards of the federal government;

(3) the Treaty of Paris, 30 Stat. 1754 (1899), which provides that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by the Congress."

While these arguments were rejected in *Camacho* v. *Rogers,* 199 F. Supp. 156 (S.D.N.Y. 1961), since they were raised again during the Senate debates, it is worth exposing their fallacies more fully.

(1) Congress' power to govern the territory of Puerto Rico does not give Congress the power to govern New York State. New York State is not a territory. It has been held that when a territory is admitted as a State, Congress' power over it ceases. *Coyle* v. *Smith,* 221 U.S. 559 (1911). *A fortiori,* when a native of a territory migrates to a state, he thereby loses any special protection he had as a resident of the territory. No one could, for example, deny that Congress has power to provide that Puerto Ricans on that island shall drive on the left-hand side of the road, as do the British, but it is equally incontestable that a Puerto Rican could not drive on the left when he came to New York City while everyone else was driving on the right. A resident of a territory, equally with a resident of a sister-state, must obey the laws of the state in which he finds himself.

It has been argued that because Congress encourages the study of Spanish in Puerto Rico, New York must let Spanish-speaking Puerto Ricans vote. Senator Kennedy said: "That his schooling takes place in Spanish is not up to him, but is due to the fact that the U.S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico . . ." May 20, 1965, Cong.

Rec. 10675. First of all, the U.S. Government does not *make* Puerto Ricans study only Spanish. No federal statute makes it a crime to study English in Puerto Rico. Such a law would be clearly unconstitutional since everybody has a constitutional right to study any language he pleases. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Puerto Ricans study Spanish because they want to. This gives no superior right to anybody else. Moreover, the fact that Congress allegedly encourages the study of Spanish makes no difference at all. Congress is entitled to encourage, in the territories, the study of Spanish, French, Russian, Hindi, Japanese, or Tamil, or any other languages it pleases, but this does not mean that New York must let someone who understands only Tamil vote because Congress, for reasons of its own, has encouraged study of this language in a territory, or because a person has decided to accept this encouragement. Congress' right to govern a territory does not give it the right to infringe state sovereignty.

(2) The alleged implied power to protect "wards" of the federal government (assuming Puerto Ricans are "wards" like Indians) may be given short shrift. At best this assumes the right to protect, and not to confer special privileges. No doubt Congress can protect President Johnson from getting shot in New York, but no one can contend that this gives Congress the power to let President Johnson vote for Mayor.

(3) Finally, the memorandum submitted by then Attorney-General Kennedy relies on the Treaty of Paris, mentioned above. This is the nuttiest argument of all. Stripped to its bare bone, it is that the President and Senate can make a treaty which will override the Constitution. The

short answer is: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert,* 354 U.S. 1, 16 (1957).

In addition, the memorandum submitted by the then Attorney-General Kennedy in 1962 states that Congress may enfranchise Spanish-speaking Puerto Ricans to "encourage the close association of Puerto Rico with this Nation." No doubt Congress would like to encourage close association with the United States on the part of U.N. delegates living in New York City, who pay sales and other taxes, and are vitally affected by the laws of New York. Could Congress thereby let U.N. delegates vote in New York elections? (The idea is not as preposterous as it sounds. Until 1928 aliens resident here were allowed to vote in some states. See *Perez* v. *Brownell,* 356 U.S. 44, 77 (1958); *Spragins* v. *Houghton,* 3 Ill. 377 (1840).) To take a more unlikely example, the federal government has a strong interest in promoting better relations with the Russians. Could it therefore allow Russians to mail in ballots to be counted in the municipal election? No doubt many Russians would like to vote in American elections, considering how little choice they get in their own. Such an experiment might well promote good-will with Russia. But the fact that Congress feels that some voting qualification is unfair, or would be better if changed, does not thereby confer on it power to make the change. The expansion of the federal government is so large these days that it is sometimes forgotten that state government exists. However, the Tenth Amendment is clear; powers not delegated to the federal government are reserved to the states. The 14th Amendment is not a *carte blanc* or open-end cornucopia of federal power. Hence,

Congress having exceeded its power to "enforce" the 14th Amendment, Sec. 4(e) of the Voting Rights Act of 1965 is unconstitutional.

POINT VII

Ignorance Is Not a Privilege or Immunity of National Citizenship.

The government may contend that a literacy test in English violates the privileges and immunities clause of the first section of the Fourteenth Amendment and hence constitutes an unreasonable classification under the Fourteenth Amendment. However, being ignorant or illiterate does not rise to the dignity of a privilege or immunity of national citizenship as protected by the Fourteenth Amendment, and hence such a classification is not covered by the Fourteenth Amendment at all.

Remaining ignorant or illiterate in the principal language of the United States is not a privilege or immunity of national citizenship under Section 1 of the Fourteenth Amendment. There is no constitutional right to be stupid. Since a state may directly compel a person to learn to read and write, it may do this indirectly by refusing to let him vote if he does not do so. No Fourteenth Amendment right is violated by compelling him to learn the national language.

The record below shows that the New York City Board of Education gives adult education courses to persons whose mother tongue is a language other than English in both day and evening courses, free of charge. Any native of Puerto Rico who is willing to exert himself can study and learn English. There is no reason why New York State should put a premium on laziness.

POINT VIII

The Corporation Counsel's Argument That the New York Law Was Conceived in Bigotry Is Without Merit.

The Corporation Counsel of New York has argued that since (allegedly) Art. 2, Sec. 1 of the New York State Constitution was conceived in original sin it is doomed for all time, however legitimate the present day purpose. He contends that one Charles A. Young proposed such a measure because of dislike of Southern and Eastern Europeans (brief, p. 22). However, Young's proposal, made in 1915, was not embodied in the 1916 revision of the New York State Constitution. Hence, Young's alleged polluted paternity cannot be traced into the 1922 amendment. Moreover, it is impossible to say that one man's views so influenced the entire New York State electorate that his notions should be imputed to the State of New York, which has to vote on all state constitutional amendments, in a referendum.

But even assuming arguendo that Art. 2, Sec. 1 was conceived in illegitimacy, its reincarnation in 1938 has certainly purged it of all its taint. In 1938, New York State held one of its periodic constitutional conventions, and it is the product of that convention which survives today. The Governor at that time was Herbert Lehman, a Jew, and a known adamant foe of racial and religious discrimination. The Chairman of the Constitutional Convention Committee which prepared the convention was Lieutenant Governor Charles Poletti, of Italian descent, and it would be strange if he were prejudiced against Southern Europeans. The roster of convention delegates contains names indigenous to all of Europe, as one would expect from New York's poly-

glot population. If these people were prejudiced against Southern and Eastern Europeans they would have to have disliked their own fathers.

Moreover, if this 1938 convention was such a hot-bed of bigots, as the Corporation Counsel would lead us to believe, it is remarkable that they inserted the first state constitutional provision specifically forbidding racial and religious discrimination, namely, Art. 1, Sec. 11, which says:

> "No person shall be denied the equal protection of the laws of this State, or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

Nor did voting qualifications go unnoticed. The 1938 Constitutional Convention Committee on Right of Suffrage & Qualifications to Hold Office proposed an amendment to strike out a limitation that citizens by marriage must be citizens for five years, but no alteration in the English language requirement was proposed. Intro. 681, Print No. 786-811-864-898, Rept. Doc. #4, N. Y. State Const. Conv. Journal & Documents. Lt. Gov. Poletti proposed an amendment that public welfare relief recipients would not be deprived of the right to vote, and Frances Bergen, now a Judge of the Court of Appeals, of New York State, proposed deletions of obsolete language in Art. 2, Sec. 1. See Intro. 496, print 523. However, nobody proposed to change the English literacy test, and there does not appear to have been debate on this. It seems to have been treated as a non-controversial provision. Under these circumstances,

whatever illegitimacy inhered in the birth of this test, if any, has been purged by subsequent re-enactment for proper purposes.

Moreover, even if the New York requirement is, as alleged, a neo-Know-Nothing product, it would still not be unconstitutional. Massachusetts and Connecticut both had English-language literacy tests, and Rhode Island had a property qualification, particularly aimed at foreign immigrants, and especially Irish Democrats, all during the reconstruction era. This was repeatedly brought to the attention of Congress, which refused to ban such tests while the amendments were on their passage. See the annexed appendices, which are being printed as law review articles, in the March, 1966 Stanford Law Review, the December, 1965 Washington University Law Quarterly, and in the Spring, 1966 Albany Law Review. Congress cannot now ban such tests regardless of the motive.

CONCLUSION

The Judgment Declaring That Sec. 4(e) of the Voting Rights Act of 1965 Is Unconstitutional, and Restraining the Attorney-General From Enforcing It, Should Be Affirmed.

Respectfully submitted,

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APPENDIX

Editorial, NEW YORK TIMES, July 30, 1965:

THE VOTING BILL

The compromise arrived at by House-Senate conferees on the voting rights bill makes final passage possible next week. This is important because no further time should be lost in registering Negroes to vote in coming elections.

Unfortunately, the conferees reconciled their two major differences in ways that are bad public policy. The decision to ban New York State's English-language literacy test for Puerto Rican citizens is a pure concession to political demogoguery. It is a device for discouraging the full integration of these citizens into a community that conducts all its public affairs in English. On the poll tax issue, the straight-forward language of the House bill outlawing the tax would have been preferable to the Senate version which the conferees accepted.

Yet, these errors of judgment do not vitiate the bill's central achievement. It provides a relatively simple, automatic and effective method to enable the Federal Government to see to it that Southern Negroes are registered and free to vote. In its basic provisions the bill represents a long-overdue move toward genuine democracy.

Editorial, NEW YORK TIMES, November 17, 1965:

OUR LANGUAGE IS ENGLISH

The Constitution of New York State provides that voters must prove their ability to read and write English. We have always felt—and still do—that this is a wise and reasonable provision. It was enacted long before the great influx of Puerto Ricans into New York, and it has never been enforced as a discriminatory measure. It rests on the fact that the affairs of New York State are conducted in English,

and that a knowledge of English is essential to understanding them.

Last summer Congress, under heavy political pressure, adopted a section of the Voting Rights Act that had the effect of permitting Spanish-speaking residents of New York to vote here if they had attended school in Puerto Rico. Now a three-judge Federal court in Washington has held that Congress exceeded its constitutional powers by this action. The court explicitly withheld any judgment on the desirability of the New York State requirement.

Another case on substantially similar grounds has been argued in the Federal District Court in Rochester, which has not yet handed down its decision. In any event the United States Supreme Court will undoubtedly have to resolve the issue finally, as is fitting in a matter of such importance. We hope that Court will affirm the right of New York State to continue to deal with this problem as it sees fit, so long as it does not do so in an arbitrary or discriminatory way.

MAR 2 6 19

JOHN F. DAVIS,

(2367)

Supreme Court of the United States

October Term, 1965

Nos. 847, 877

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, *et al.*,

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against

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF NEW YORK, *AMICUS CURIAE* IN SUPPORT OF APPELLEES, FOR LEAVE TO ARGUE ORALLY.

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The Attorney General of New York hereby respectfully moves this Court for leave to present 30 minutes of oral argument, as *amicus curiae* in support of appellees in the above entitled appeals. A brief *amicus curiae* has been prepared and will be submitted before April 10, 1966.

The Attorney General of New York has a statutory duty to defend the constitutionality of statutes of the State. At issue on these appeals is not only the validity of § 4(e) of the Voting Rights Act of 1965 but also the validity, under the Constitution of the United States, of the provisions of

the New York Constitution and statutes which require voters to be literate in the English language.

Movant is a party to another case involving an identical question of law (*United States* v. *County Board of Election of Monroe County,* 248 F. Supp. 316 [1965]). That case was decided adversely to the defendants there by a three-Judge District Court in the Western District of New York. A direct appeal to this Court was dismissed for want of jurisdiction on March 21, 1966. Appeal is still pending, however, in the United States Court of Appeals for the Second Circuit.

That appeal cannot, however, in the normal course of events reach this Court before argument and decision of the instant appeals. Since the questions of law in these cases and the Monroe County case are identical, it is anticipated that further appeals in the latter case will be obviated by this Court's decision in the instant appeals.

The Attorney General of New York, therefore, respectfully requests the opportunity to be heard by this Court in oral argument as *amicus curiae* in the instant appeals in order to present the arguments of the State of New York in support of its own constitution and statutes and its arguments against the validity of § 4(e) of the Voting Rights Act of 1965.

Movant does not believe that the argument on behalf of appellees will fully present all the issues involved in the case before the Court. Appellees have a personal interest in the litigation and in the protection of their own votes. However, the Attorney General of New York has an interest which is statewide in scope. It involves the application of both the State statutory and constitutional provisions and of § 4(e) on a statewide basis and directly

affects the powers of the State to determine the qualifications of its voters and to enforce its Election Law. The Attorney General submits that this wider viewpoint and the interests of the State as a whole should be presented to the Court and will not be presented by the argument on behalf of the individual litigants.

Although the State is a party in *Cardona* v. *Power* (No. 673, this Term), that case arose prior to the enactment of § 4(e) and does not involve any question as to the validity of the Federal Act. Since that case has been placed on the summary calendar, the time permitted for argument therein could not be sufficient to allow presentation of the State's interests and arguments as to the validity of § 4(e).

It is, therefore, respectfully requested that the Attorney General of New York, as *amicus curiae* be permitted to present 30 minutes of oral argument in order to place before the Court the interests of the State in the area of the determination of voter qualifications.

Dated: March 24, 1966.

Respectfully submitted,

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(2373)

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BRIEF, *AMICUS CURIAE*, ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL, IN SUPPORT OF APPELLEES

Statement

Appellants have appealed to this Court from an order and judgment of the United States District Court of the District of Columbia, which judgment declared § 4(e) of the Voting Rights Act of 1965 (Public Law 89-110, 79 Stat. 439) unconstitutional as beyond the power of Congress to

enact either under the Fourteenth Amendment to the United States Constitution or under Article IV, § 3 of that Constitution. The consequence of this decision was to uphold the validity of the provisions of New York Constitution, Article II, § 1, and New York Election Law, §§ 150 and 168, which require voters in this State to be literate in the English language.

Interest of the *Amicus Curiae*

This brief is filed, *amicus curiae,* by the Attorney General of New York pursuant to his statutory duty to defend the constitutionality of State statutes. There is, in this case, no issue of discrimination against qualified voters on grounds prohibited by the Fifteenth or Nineteenth Amendments to the United States Constitution, nor is there any intent or interest on the part of *amicus* here to prevent any qualified voters from exercising their right of franchise nor has there been any such suggestion that such was the intent. The position of *amicus* here is solely to uphold the right of the State to determine the qualification of voters, within the framework of the exceptions specifically provided in the Federal Constitution, and to freely and without restraint select those qualifications which are permitted by the Constitution.

Questions Presented

The questions presented by this appeal relate directly to the power of Congress and the States under the Constitution of the United States in regard to establishing qualifications for voting. In summary, these questions are:

1. Whether the power of Congress to enforce the Fourteenth Amendment to the United States Constitution,

by appropriate legislation, authorizes an enactment, such as § 4(e) of the Voting Rights Act, barring State requirements of English literacy as a qualification for voting;

2. Whether New York State's requirement of English literacy as a qualification for voting in fact violates any provision of the Fourteenth Amendment; and

3. Whether the power of Congress to govern the territories of the United States includes the power to prohibit the States from requiring literacy in English as a qualification for voting, in so far as territorial natives are concerned.

Factual Background

Section 4(e) of the Voting Rights Act of 1965 (P. L. 89-110, 79 Stat. 439), as applicable here, prohibits denial of the right to vote to any person in any Federal, State or local election because of his inability to read, write, understand, or interpret any matter in the English language if he demonstrates that he has successfully completed six grades in a public school or accredited private school in Puerto Rico in which the predominant classroom language was other than English. The Act became effective on August 6, 1965.

On the day the Act became effective the plaintiffs filed a complaint in the United States District Court for the District of Columbia, pursuant to the provision of § 14(b) of the Voting Rights Act of 1965, requesting the covening of a three-judge Court, and alleging that § 4(e) is unauthorized under the Fourteenth Amendment to the United States Constitution, violates the provisions of the Tenth Amendment, and deprives plaintiffs of rights under the Fifth and

Ninth Amendments (R. 1-3). Plaintiffs asked for a "declaratory" judgment holding § 4(e) unconstitutional (R. 3).

The Commissioners of Election of New York City were subsequently added as parties defendant (R. 10-12).

The answer of defendant Katzenbach alleged that the New York English literacy requirements were unconstitutional and denied allegations of the unconstitutionality of the Federal Act (R. 37-39).

Plaintiffs moved for summary judgment based upon pleadings before the Court and memoranda of law (R. 19-20). Defendants cross-moved for summary judgment, additionally alleging, in effect, that the purpose and effect of the New York law was discrimination against Puerto Ricans, but nowhere in the pleadings or in the motions for summary judgment was any allegation made that the section was enacted in implementation of the powers of Congress pursuant to Article IV, § 3.

Decision Below

Two members of the Court joined in holding § 4(e) unconstitutional (District Judges HOLTZOFF and MCGARRAGHY) (247 F. Supp. 196). Circuit Judge MCGOWAN dissented in a separate opinion.

Discussing the Voting Rights Act as a whole and the legislative history of § 4(e), the majority opinion observed (R. 83-84):

> "The voting Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. Potent machinery is created by the statute to achieve this end. Section 4(e) is, however, completely and entirely disassociated from the

rest of the Act and constitutes no part of the scheme of the legislation. The measure originated in the Senate. Section 4(e) was not in the bill as reported by the Senate Committee on the Judiciary. It was inserted by an amendment from the floor. After the bill passed the Senate, the House of Representatives struck out the entire bill except the enacting clause and substituted a different measure, which again did not include any such provision. Section 4(e) was, however, reinserted by the Conference Committee and remained in the measure as finally passed. It is quite apparent that the Section did not receive consideration by any legislative Committee in either House. While Section 4(e) was directed at the Puerto Rican situation in New York, which has already been briefly described, actually it is much broader in its phraseology and scope and conceivably may be applicable to many other citizens who are illiterate in English, and is effective throughout the United States."

The Court then pointed out that "traditionally and historically the qualifications of voters has been a matter regulated by the States" (R. 84) and that "no express or implied power is conferred by the Constitution on Congress to legislate concerning requirements of voters in the several States" (R. 84). The Court below also recognized that *the right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States* (R. 84-85). Constitutional amendments, the Court pointed out, were necessary to guarantee women the right to vote and to eliminate poll taxes as a qualification for voting in Federal elections (R. 85-86).

The right of the States to establish non-discriminatory literacy tests as a qualification for voting has been recently upheld by this Court (*Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45 [1959], a case the Court below observed, which dealt with an *English* literacy requirement (R. 86-87).

Of course, the District Court recognized that there are limitations upon the rights of the States to establish voter qualifications, stating (R. 87-88):

> "There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude * * *.
>
> "By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. * * *
>
> "The latest Constitutional Amendment in this field is the Twenty-fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. * * *
>
> "Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment. If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage."

The Court further held that a distinction between persons literate in English and those not literate in English is a reasonable classification and not a violation of the equal protection clause of the Fourteenth Amendment (R. 89).

As to the intimation in the cross-motion for summary judgment that the New York statute's purpose was discrimination against Puerto Ricans, the Court held (R. 90):

> "A veiled intimation that the New York literacy test was intended to exclude Spanish-speaking citizens from the franchise is both irrelevant in law and untenable in fact. The requirement was originally adopted in 1921—long before the large influx of Puerto Ricans into New York."

While not appearing anywhere in the pleadings, the defendants contended on oral argument before the District Court that § 4(e) could be sustained as an exercise of the power of Congress to regulate the territories pursuant to Article IV, § 3, of the Constitution. Rejecting this argument, the Court held (R. 90):

> "There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited nor directed solely to Puerto Ricans and, therefore, cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved."

The dissenting member of the Court adopted the argument that § 4(e) was a valid exercise of the power of Congress to govern the territories. This result was arrived at by posing a hypothetical situation, assuming its rather questionable validity, and then arguing that § 4(e) was a parallel situation (R. 94). Thus, instead of reasoning based on § 4(e) alone, this opinion creates a new problem, unrelated to the case, *i. e.*, the validity of an irrelevant hypothesis.

The dissenting Judge found in § 4(e) an extension of the legislative tradition of giving Puerto Ricans self-government in the Commonwealth (R. 93), without considering the fact that § 4(e) has no application whatsoever in the Commonwealth itself and can in no way further self-government there. This Judge, therefore, considered the suggested policy of Congress in fostering education in Spanish in Puerto Rico to warrant Congressional invalidation of an otherwise valid State statute (R. 98, 99).

Background of New York English Literacy Law

New York's English literacy requirements became part of its law in 1921 by amendment of the State Constitution (Art. II, § 1) and in 1923 by amendment of the Election Law (L. 1923, ch. 809). At the time of enactment there were only 7,000 Puerto Ricans living in New York City. By no stretch of the imagination can New York's English literacy provisions be interpreted as deliberate discrimination against this group, as intimated in the cross-motion for summary judgment by the defendant in this proceeding (R. 41). An examination of the history of the English literacy requirement will further effectively disprove any intent to discriminate against any group.

In 1920, the preliminary report of a Joint Legislative Committee of the New York State Legislature recommended an increase in the extention of education facilities to the foreign-born and native adult populations (Leg. Doc. No. 52, 1920, pp. 6-7). One purpose to be promoted was vocational efficiency and it was recommended that classes be set up in factories and other places of employment.

Governor Alfred E. Smith, in a message to the State Assembly in 1919, stated:

> "Ignorance is the greatest ally of our poor citizenship. It should be our objective that no person in this State who can be brought under our influence should be without the ability to read and write, or without a clear conception of our American institutions and ideals."

The English literacy provisions of New York's law were adopted at a time when the attention not only of the State but the nation as a whole was focused on the problems of illiteracy which had come to the forefront during World War I.

In March 1918, then Secretary of the Interior Lane wrote to President Woodrow Wilson:

> "I believe that the time has come when we should give serious consideration to the education of those in the United States who cannot read or write. The war has brought facts to our attention that are almost unbelievable and that in themselves are accusatory. An uninformed democrary is not a democracy."

The Joint Legislative Committee in its report noted the effect of Lane's letter upon its recommendations, stating:

> "The astounding revelations of illiteracy and of complete ignorance of the English language among the men drafted for service in the late war, have been given to us by the Secretary of the Interior. Mr. Lane's figures speak for themselves, approximately:
>
> 'Forty thousand men in the army who could not take commands in English;
>
> 'Four hundred thousand men of draft age in the country who could not read or write in any language.' "

In their article, "The Case Against Night Work", Josephine Goldmark and Louis Brandeis wrote:

> "Ignorance of the English language is the greatest obstacle to industrial advancement. It prevents the distribution of congested immigrant populations and increases injuries and occupational diseases, owing to

> the immigrants' inability to understand orders or hygienic regulations printed or orally given in industrial establishments."

Thus, New York's English literacy requirement for voting was a part of a much greater program for literacy and education for all—the need for which had been demonstrated by wartime experience of inefficiency and inability to communicate. In addition to the voter qualification amendment, the Committee also recommended broad Education Law amendments, extending night schools and requiring training of minors from 16 to 21, even if employed.

At approximately the same time, the 66th Congress was considering a Senate-introduced Americanization act. The purpose of that bill was stated to be:

> "* * * to consider a program of Americanizing illiterates and those unable to speak, read or write the English language. The theory of the bill is the process of stimulating the states to adopt certain compulsory teaching of English to illiterates and to that great body of those in this country who cannot speak, read or write the English language."

As early as 1906, Congress required naturalized aliens to be able to speak English (34 Stat. 599, § 8). In 1950, the Naturalization Act was amended to require *literacy* in English (64 Stat. 987, § 30); a requirement repeated in the Immigration and Naturalization Act of 1952 (66 Stat. 163).

The recommendations of New York's Joint Legislative Committee resulted in adoption by the voters of New York in 1921 of an amendment to the New York Constitution, requiring that all new voters after January 1, 1922 must be literate in English. This constitutional amendment was implemented by amendments to the State Election Law in 1923 (L. 1923, ch. 809).

New York's English literacy requirements were thus adopted not to discriminate against any group of persons, but to meet an observed need to raise the educational standards of the population as a whole and to produce a better informed and more responsible electorate.

Legislative History of Section 4(e)

The Voting Rights Act of 1965 is primarily intended to prevent discriminatory administration of the right to register and vote. The purpose of the basic act is clearly expressed in § 2, which states:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge the right of any citizen of the United States to vote on account of race or color.*" (Italics added.)

Its intent was to protect rights guaranteed by the Fifteenth Amendment to the United States Constitution and was enacted after intensive study by Congress of racial discrimination in voting. The House and Senate Judiciary Committees each held nine days of hearings and received testimony from a total of 67 witnesses.

None of that testimony and none of that study concerned the provisions subsequently enacted as § 4(e)!

As stated by the Court below (R. 83):

> *"Section 4(e) is, however, completely and entirely disassociated from the rest of the Act and constitutes no part of the scheme of the legislation."* (Italics added.)

This section was inserted in the bill by amendment from the floor in the Senate. After the bill passed the Senate, the House of Representatives struck out the entire bill, except the enacting clause, and substituted a different measure, which again did not include any such provision

as § 4(e). The section was reinstated by the Conference Committee and remained in the measure as finally passed (R. 83).

Section 4(e) received no consideration by any legislative committee in either House. While directed at the Puerto Rican residents of New York, actually § 4(e) is much broader in its terms, may conceivably be applicable to many other citizens who are illiterate in English and is effective throughout the United States.

The debate on § 4(e) was confined to floor debate on parts of two days (May 20 and August 4, 1965). Its proponents argued that exclusion of Puerto Ricans, not literate in English although literate in Spanish, from participation in elections in New York is an arbitrary classification in violation of the Fourteenth Amendment (Cong. Rec., May 20, 1965, p. 10675). The opponents of the measure pointed to the cases which had held English literacy requirements not violative of the Fourteenth Amendment provisions and questioned the constitutional power of Congress to impose such a requirement upon the States (see, *e.g.*, Cong. Rec., Aug. 4, 1965, p. 18663).

No mention was made by the proponents of any argument that § 4(e) was to be enacted in furtherance of the power of Congress to govern the territories, although it was stated that education of Puerto Ricans in Spanish in Puerto Rico was a policy fostered by Congress (Cong. Rec., May 20, 1965, p. 10688).

Opposition to the amendment was expressed by Senator Hruska of Nebraska, a member of the conference committee, who stated (Cong. Rec., Aug. 4, 1965, p. 18663):

> "The reasons why I was opposed to this provision are first, that it is a matter for the State itself to deal with; it is of doubtful constitutionality for Congress

to override this law. It is very important that a knowledge of the English language be possessed by a voter.

"Supporting evidence of this fact was found in the record. In the next general election in that State, there will be some 20 or 25 propositions on the ballot for the purpose of amending the New York State Constitution. Without a knowledge of the English language it would be virtually impossible for voters even to identify the amendments, let alone to scan them for the purpose of determining their substance and merit. For that reason, and for others, this Senator certainly disagreed with that provision.

"One of the further arguments is that the national policy is that there be common access to the facts and that the knowledge of English is necessary to discharge the responsibilities of citizens.

"We know that, because in order to become naturalized one must have a working knowledge of the English language. It is necessary to have that knowledge for the purpose of serving on a jury."

Basic arguments on the amendment centered around the power of Congress to enact the provision, not upon facts showing any discrimination. There were statements estimating the numbers of eligible Puerto Rican voters in New York, but no certain figures on registration were produced or statistics as to numbers of Puerto Ricans not eligible to vote because of the English literacy requirements. There was no testimony whatsoever taken as to this provision of the Voting Rights Act and no evidence of "an insidious and pervasive evil" such as this Court found to be the basis for the enactment of those provisions of the Voting Rights Act of 1965 dealing with Fifteenth Amendment rights (*South Carolina* v. *Katzenbach*, decided Mar. 7, 1966, 34 L. W. 4207, 4208).

Summary of Argument

The basic question on this appeal, presented by the decision of the Court below, is whether the power of Congress to enact legislation appropriate to the protection of rights guaranteed by the Fourteenth Amendment embraces an authority to enact a statute such as § 4(e) of the Voting Rights Act of 1965. Consequently, the primary argument advanced by this brief asserts that § 4(e) is not such appropriate legislation and, in fact, concerns no rights guaranteed by the Fourteenth Amendment.

Congress may enact a provision such as § 4(e) only if the English literacy provisions of New York's Constitution and statutes do, in fact, violate any rights guaranteed by the Fourteenth Amendment. An English literacy requirement, applicable to all citizens alike and applied in a nondiscriminatory manner, does not deny to any citizen the equal protection of the laws nor abridge privileges and immunities of United States citizenship.

The power of Congress to regulate and govern the territories does not authorize the enactment of a statute, applying to no territory but only to the States of the United States, which grants to former residents of a territory political rights greater than those enjoyed by other citizens of the States and which acts in derogation of rights reserved to the States by the Constitution of the United States.

Section 4(e) itself discriminates in that it prefers one class of native-born citizens over another.

POINT I

The power of Congress to enact legislation under the Fourteenth Amendment is limited by § 5 of the Amendment to legislation appropriate to the protection of rights guaranteed by that Amendment. Section 4(e) of the Voting Rights Act of 1965 relates to no rights guaranteed by the Fourteenth Amendment and is consequently not appropriate legislation.

In enacting § 4(e), Congress specifically declared that its purpose was to "secure the rights under the Fourteenth Amendment" to the United States Constitution. Section 5 of that amendment provides that Congress may enact "appropriate" legislation to enforce the prohibitions of the amendment. It has long appeared that the nature of that legislative authority was well understood. However, the position taken by the Justice Department in this case and § 4(e) itself compel a review of the cases which have dealt with the Congressional power.

In dealing with the power of Congress under the Civil War amendments, the Court, in *Ex parte Virginia* (100 U. S. 339 [1875]), stated (p. 345):

> "Congress is authorized to *enforce* the prohibitions by appropriate legislation."

The *caveat* in these words, however, is in the phrase "enforce the prohibitions". The power granted to Congress is not plenary; it is limited to enforcing the *prohibitions* of the amendments. As this Court stated, as to the powers of Congress under the Fifteenth Amendment, in *South Carolina* v. *Katzenbach* (*supra*, 34 L. W., p. 4213):

> "Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."

Once again, the power is described as the power to enforce prohibitions and this Court also recognized limits on that power by pointing out that the Court has found an exercise of the power to be unconstitutional when it "attacked evils not comprehended by the Fifteenth Amendment" (see *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127).

In a decision which followed *Ex Parte Virginia, supra*, by four years, this Court further elaborated upon the restrictions on Congressional action implicit in the terms of the amendment. In the *Civil Rights Cases* (109 U. S. 3), the Court stated (p. 13):

> "And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, *adverse to the rights of citizens sought to be protected by the Fourteenth Amendment*, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority." (Emphasis added.)

This Court there agreed that Congress could provide in advance to meet *actual* future violations, but that it could not define or enact laws relating to all rights protected, for this would be the Congressional enactment of a "municipal code", an act beyond the power of Congress.

A subtle but significant distinction is found in the Court's holding that Congress, under the Fourteenth Amendment, may not establish affirmative laws for the equal protection of the laws, but may only enact corrective legislation (109 U. S. at pp. 13-14). In dealing with the Federal statute involved in that case, the Court stated that the question to be considered was whether the law was, in fact, of a corrective character (109 U. S. at p. 14).

The same question is equally pertinent in the consideration of the issues presented by the instant case.

The validity of the principles enunciated in these early cases as to the power of Congress under the Fourteenth Amendment had acquired such an unquestioned status that, until the cases arising under the Voting Rights Act of 1965, there were no cases in this Court in this century in which the Court was required to pass upon the power of Congress under the amendment. The Court in those early cases, decided shortly after the adoption of the amendment, carefully considered the power granted to Congress thereby and, while the ambit of the substantive rights protected has been subsequently expanded, the power of Congress has not been similarly expanded beyond its original limits.

Worthy of further mention here are two other judicial expressions of the power of Congress under the Fourteenth Amendment. In *United States* v. *Cruikshank* (92 U. S. 542 [1875]), the Court held (p. 555):

> "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees but no more. The power of the National Government is limited to the enforcement of this guaranty."

Significant to the argument that will be advanced at a later point in this brief, *i.e.*, that the determination of the qualifications of voters is a matter peculiarly within the jurisdiction of the States, is the holding of this Court in *In re Rahrer* (140 U. S. 545 [1891]), wherein the Court stated (pp. 554-555):

> "The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation."

The argument advanced on this appeal, that Congress may not create violations of the Fourteenth Amendment but only enforce its prohibitions, is consistent with the holding of this Court, in relation to the power of Congress to enforce the Fifteenth Amendment, in *South Carolina* v. *Katzenbach, supra,* wherein this Court observed that acts of Congress had been held unconstitiutional which "attacked evils not comprehended by the Fifteenth Amendment" (34 L. W., p. 4213) and sustained certain provisions of the Voting Rights Act of 1965, holding that Congress may fashion specific remedies and apply them to particular localities (34 L. W., p. 4214). Section 4(e), however, does not fashion a remedy but creates a new violation. It attempts to categorize, as a violation of the Fourteenth Amendment, State action which in the past not only has been held not to violate the amendment but has been held to be in an area not comprehended within the terms of the Fourteenth Amendment.

Prior Federal legislation under this amendment has not established new substantive violations, but only enunciated in statute form those rights which had judicial precedent for inclusion. The statutory provisions referred to by this Court in *Virginia* v. *Rives* (100 U. S. 313 [1879]) merely incorporated, under the Fourteenth Amendment, rights which had already been declared to be rights of United States citizenship under the Fifth Amendment.

Even assuming that Congress may enact legislation defining rights deemed to be protected by the amendment, the interpretation of the extent of these rights is the province of the Courts and the Courts are the final arbiters of whether such are, in fact, rights protected by the Fourteenth Amendment.

Consequently, unless provisions such as those of the New York Constitution and Election Law, requiring literacy in English as a qualification for voting, actually violate any rights guaranteed by the Fourteenth Amendment, § 4(e) is, as the Court below held, beyond the power of Congress to enact and, therefore, unconstitutional.

POINT II

A State requirement that its voters be literate in the English language is not unreasonable or arbitrary and does not violate any rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Because Congress may only enact "appropriate" legislation to protect rights guaranteed by the Fourteenth Amendment, § 4(e)'s validity depends upon a finding that New York's English literacy requirement is in derogation of rights guaranteed by the Fourteenth Amendment and thus unconstitutional. Conversely, if as contended here New York's requirements do not violate any provision of the Fourteenth Amendment, § 4(e) is not within the power of Congress to enact under that amendment.

A. The establishment of voter qualifications is a power reserved to the States by the Constitution and the right to vote is an incident of State and not National citizenship.

The United States Constitution, from its inception, has specifically confirmed the reservation to the States of their

right to prescribe the qualifications of their voters and to regulate their elections generally. Article I, § 2, referring to the election of members of the House of Representatives, provides:

> "The electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature."

As to the control of the States over Congressional elections, Article I, § 4 provides, in part:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof * * *."

Forty-five years after the Fourteenth Amendment became effective, the member States of the Union once again reaffirmed this division of powers between the Nation and the States. In the Seventeenth Amendment they provided:

> "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

This principle of the Constitution, that the qualifications to be possessed by voters are within the sole province of the States, has been reaffirmed time and again by this Court, beginning with *Minor* v. *Happersett* in 1875 (21 Wall. 162). In that oft cited decision, the Court stated (pp. 177-178):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

The power of the States to establish voter qualifications was discussed at length by the Court in *Pope* v. *Williams* (193 U. S. 621, 632 [1904]) wherein the Court held constitutional a Maryland statute requiring a declaration of intention to become a resident to be filed at least one year prior to qualification as a voter. In so doing the Court stated (pp. 632-633):

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor* v. *Happersett, supra*, such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated * * *."

The Court below in the instant case, holding § 4(e) unconstitutional, recognized that there are limitations on the power of the States to impose voter qualifications (R. 87-88):

> "Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States."

Consequently, the States have the sole power to establish qualifications of voters, except as limited by the Fifteenth, Nineteenth and Twenty-fourth Amendments, and, except as they relate to those amendments, Federal laws may only protect the rights of voters who are qualified under State law. In the instant situation, New York's English literacy requirement is a qualification for voting, which does not discriminate in violation of any provisions of the above-cited amendments, and does not constitute discriminatory restriction upon those already qualified to vote.

Mr. Justice Douglas, writing for this Court in *Gray* v. *Sanders* (372 U. S. 368 [1963]), invalidating Georgia's county-unit system, reaffirmed the long established rules above stated when he wrote (p. 379):

> "States can within limits specify the qualifications of voters in both state and federal elections, the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter."

And further at pages 380-381:

> "Minors, felons, and other classes may be excluded. See *Lassiter* v. *Northampton Election Board, supra*, p. 51. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."

This opinion also clearly demonstrates the distinction between the voter qualification cases and the reapportionment cases, such as *Gray* v. *Sanders, supra*, and *Reynolds* v. *Sims* (377 U. S. 533 [1964]). In the latter group of cases,

this Court acted to protect qualified voters from illegal discrimination in the *counting* of their votes. Those cases did not effect any change in the principle of State power to initially determine qualifications.

In March of last year, Mr. Justice STEWART, writing for this Court in *Carrington* v. *Rash* (380 U. S. 89 [1965]) stated (p. 91):

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50. Compare *United States* v. *Classic*, 313 U. S. 299; *Ex parte Yarborough*, 110 U. S. 651. 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' *Pope* v. *Williams, supra*, at 632."

While the *Carrington* case was cited in the Court below as authority for the proposition that discriminatory State voter qualifications may be invalidated under the equal protection clause of the Fourteenth Amendment, the Court below recognized the clear limitation of that case to the particular principle involved, stating (R. 89):

> "The States are barred from making an unreasonable classification between various groups of citizens in determining who should have the right to vote. Thus, in *Carrington* v. *Rash*, 380 U. S. 89, *supra*, it was held that while a State may impose reasonable residence requirements for voting, it may not deny the ballot to a *bona fide* resident merely because he is a member of the armed forces of the United States. In other words, the State is precluded from distinguishing between

> residents who are civilians and residents who are members of the armed services, on the ground that such a distinction is an unreasonable classification and discrimination in violation of the Equal Protection of the Laws clause."

However, the *Carrington* case is even more limited as a precedent in that the constitutional right protected thereby was not the right to vote but one of the basic, longer recognized rights of federal citizenship—the right to move from State to State and change one's residence. This Court recognized the right of the State to demand adequate proof of an intent to become a resident but denied the State the right to prevent a member of the armed services, or, in effect, a member of any other group, from becoming an actual resident of the State. The result would have been the same if the residency involved was a qualification for a professional license or property ownership instead of a voting qualification.

In *South Carolina* v. *Katzenbach, supra,* this Court cited the *Carrington* case in support of the proposition that States "have broad powers to determine the conditions under which the right of suffrage may be exercised" (34 L. W., p. 4213), adding the further considerations as to the Fifteenth Amendment (*ibid*):

> "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of State power. 'When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over where State power is used as an instrument for circumventing a federally protected right.' *Gomillion* v. *Lightfoot,* 364 U. S. at 347."

From the above quoted cases it is clear that the States have sole and plenary power, insulated from Congressional as well as judicial review, to determine the qualifications

of their voters, except as restricted by specific Constitutional prohibitions.

The essential question on this appeal, therefore, is does New York's English literacy qualification for voting actually violate any Fourteenth Amendment rights, bringing it within the ambit of Congressional power?

B. The right to vote, as an incident of State citizenship, is not within the rights of Federal citizenship guaranteed by the Fourteenth Amendment.

The provisions of the Fourteenth Amendment which have significance to this case are those guaranteeing equal protection of the laws and prohibiting the abridgment of privileges and immunities of citizens of the United States. Only four years after the adoption of the Fourteenth Amendment, the Supreme Court of the United States dealt with the definition of the privileges and immunities protected by that amendment in the *Slaughter-House Cases* (16 Wall. 36 [1872]). In those cases the Court stated:

> "* * * the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." (p. 73.)
>
> * * *
>
> "Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the States, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by the clause under the protection of the Federal Constitution, and that the latter, whatever they may be are not intended to have any additional protection by this paragraph of the amendment." (p. 74.)
>
> * * *
>
> "Its purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify,

> or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (p. 77.)

(See also, *Duncan* v. *Missouri*, 152 U. S. 377, 382 [1894]; and *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 [1934].)

This same interpretation of the privileges and immunities clause has been repeated in more recent times. In *Prudential Insurance Company* v. *Cheek* (259 U. S. 530 [1922]), this Court stated (p. 539):

> "But, as this court more than once has pointed out, the privileges or immunities of citizens protected by the Fourteenth Amendment against abridgement by State laws are not those fundamental privileges and immunities inherent in *State* citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution, or its laws. [citing cases.]"

In an election case from the State of Illinois this Court discussed the clause as it affects election matters (*Snowden* v. *Hughes*, 321 U. S. 1 [1944]). The Court of Appeals for the Seventh Circuit had upheld the Illinois statute, holding among other things that the Fourteenth Amendment brings under Federal control only acts by States which are violative of rights secured by the United States Constitution (132 F. 2d 476 [1943]). Affirming, this Court specifically considered the validity of the Act under the privileges and immunities clause of the amendment. Thereon the Court held (321 U. S. at pp. 6-7):

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely

from the relationship of the citizen and his state established by state law. * * * *The right to become a candidate for state office, like the right to vote for the election of state officers,* * * *is a right or privilege of state citizenship, not of national citizenship, which alone is protected by the privileges and immunities clause.*" [Emphasis added.]

The extent of the application of the equal protection clause was succinctly stated in *Henderson* v. *United States* (63 F. Supp. 906 [D. C. Md. 1945]), when the Court said (pp. 912-913):

> "The Equal Protection Clause of Art. IV, § 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discriminating against citizens of other States in favor of its own citizens. [citing authorities] * * * Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgement. The Slaughter-House Cases. 16 Wall. 36, 21 L. Ed. 394."

Consequently, the rights protected under the Fourteenth Amendment do not include all attributes of citizenship. Specifically, they do not include voter qualifications unless the requirements for such qualifications are unreasonable, arbitrary or discriminate in violation of other constitutional provisions.

As this Court said in *Rice* v. *Sioux City Cemetery* (349 U. S. 70, 72 [1955]):

> "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked."

Section 4(e) of the Voting Rights Act of 1965 specifically states that it was enacted to secure Fourteenth Amendment rights. Unless the Federal activity in behalf of Puerto Rico, described in appellant's brief on this appeal, was in furtherance of some constitutionally guaranteed rights peculiar to residents of Puerto Rico or directly related to rights of United States citizenship protected by the Fourteenth Amendment, the amount or extent of such legislation is totally immaterial to the power of Congress to enact § 4(e), as appropriate to the enforcement of the Fourteenth Amendment.

It should be noted that the Congressional policies referred to in appellant's brief relate to Puerto Ricans *in* Puerto Rico. They are concededly enactments under Article IV, § 3 of the United States Constitution and the Treaty of Paris (30 Stat. 1754, 1759). However, neither of those authorities give former residents of Puerto Rico any superior rights over those of other citizens of their State of residence on the mainland. It is further significant to note that the Fourteenth Amendment does not apply to territories of the United States nor to citizens resident therein (*South Porto Rico Sugar Co.* v. *Buscaglia*, 154 F. 2d 96 [C. C. A. Puerto Rico, 1946]).

The rights protected by the Fourteenth Amendment are those inherent in United States citizenship, not territorial or State citizenship. The Constitution confers no special privileges upon citizens of the territories or the Commonwealth of Puerto Rico. In fact, and conclusive of the fact that the right to vote is not an incident of Federal citizenship, while citizens of the Commonwealth of Puerto Rico are citizens of the United States, they are not entitled to vote in Federal elections, so long as they remain residents of the Commonwealth.

As to United States citizens, the Constitution is satisfied if the State requirement as applied to all citizens within its borders, whatever their place of origin, is not discriminatory, arbitrary or unreasonable. New York's English literacy requirement applies to all voters, whethey they were born or education in New York, Puerto Rico, Arkansas, or France.

C. A requirement of literacy in English is a valid and constitutional voter qualification which a State may impose upon citizens resident therein.

The power of Congress under the Fourteenth Amendment to prohibit a State requirement of English literacy by its voters hinges upon whether such an English literacy requirement deprives any citizen of rights guaranteed by the Fourteenth Amendment. The reasonableness of such a State requirement does not rest upon whether it is reasonable for New Mexico, or Louisiana, or Hawaii to *permit* their voters to be literate in a language other than English but on whether it is reasonable for New York to require its voters to be literate in English.

Apropos the arguments raised as to those other States, it is interesting to note that in each case the language other than English, in which voters may qualify, is the language which was spoken by the residents of that area when it was acquired as a territory by the United States; it is in effect the native language of the area. Significantly, Hawaii requires literacy in English or Hawaiian but makes no provision for its many native-born citizens who may be literate only in Japanese or Chinese. Thus, the arguments as to what other States permit has no significance as to the power of Congress to require a State to permit literacy in a language, other than English, which is not native to the State.

Appellants herein concede the validity of a State requirement that its voters be literate (brief, p. 43); contesting only the validity of a requirement that voters be literate in English. The issue, however, is not that simple; for in the basic rationale supporting literacy requirements in general lies all the constitutional principle and much of the rationale supporting requirements of English literacy.

Only seven years ago this Court upheld the validity of North Carolina's English literacy requirement (*Lassiter* v. *Northampton Election Board*, 360 U. S. 45 [1959]) in a decision cited with approval in more recent cases (see, *e.g.*, *Gray* v. *Sanders*, 372 U. S. 368, 379 [1963]; *Carrington* v. *Rash*, 380 U. S. 89, 91 [1965]; and *cf. South Carolina* v. *Katzenbach, supra*, 34 L. W. at p. 4216 [1966]). Therefore, a close analysis of the *Lassiter* decision is essential to the issues on the instant appeal. The North Carolina constitutional provision there involved provided, in part:

> "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language."

As to the validity of that requirement this Court held (pp. 50-51):

> "We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn* v. *United States, supra*, at 366, disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.'
>
> "The States have long been held to have broad powers to determine the conditions under which the

> right of suffrage may be exercised, * * * absent of course the discrimination which the Constitution condemns. * * * So while the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction which Congress acting pursuant to its constitutional powers has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment * * * speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.' *McPherson* v. *Blacker*, 146 U. S. 1, 39.
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is a wide scope for exercise of its jurisdiction."

Considerations which the States obviously might take into account in setting voter qualifications were listed by the Court as including age and previous criminal record. As to literacy, the opinion states (pp. 51-53):

> "The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. *Cf. Franklin* v. *Harper*, 205 Ga. 779, 55 S. E. 2d 221, appeal dismissed 339 U. S. 946. It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith*, 159 Mass. 413-414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of the policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

In a lengthy footnote, this Court discussed the literacy requirements of the various States (pp. 52-53). It pointed out that 19 States have some sort of literacy requirement. Those States having specific provisions as to English literacy were distinctly specified,[1] clearly showing that this Court was aware, in considering the North Carolina statute, of the requirement of literacy specifically in English.

Concluding that the North Carolina provision was valid, the Court held (pp. 53-54):

> "The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot."

Conceding that literacy in general may be required of prospective voters, the question involved in the instant appeal is whether a requirement of literacy in English has sufficient relation to the aims of representative government and a legitimate State interest in an informed electorate (see, *Carrington* v. *Rash, supra*, and *cf. Louisiana* v. *United States*, 225 F. Supp. 353, 386 [E. D. La.], affd. 380 U. S. 145).

Both prior to and following this Court's decision in the *Lassiter* case, *supra*, the constitutionality of New York's

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[1] The Court in the *Lassiter* case listed New York, Wyoming, Connecitcut and Washington, in addition to North Carolina as requiring English literacy. The record on this appeal additionally lists Alabama, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Maine, and Massachusetts as having English language literacy requirements (R. 72).

English literacy requirement was challenged in a multiplicity of court actions. In *Camacho* v. *Doe* (31 N. Y. Misc. 2d 692 [Sup. Ct., Bronx County, 1958]), the New York Supreme Court held that requirement valid, stating (p. 693):

> "None of these provisions contravene the United States Constitution. The petitioner is not denied the right to vote. Under the laws of the State, however, he must first learn to read and write English. This cannot be deemed an unreasonable requirement."

This decision was affirmed, without opinion, by the New York State Court of Appeals (7 N. Y. 2d 762 [1959]). The petitioner in that case then commenced a proceeding before a three-Judge Court in the Southern District of New York (*Camacho* v. *Rogers*, 199 F. Supp. 155 [1961]). The complaint there alleged that petitioner's right to vote was guaranteed by the Treaty of Paris, the Fourteenth Amendment, the Fifteenth Amendment, the Federal Civil Rights Act and the United Nations Charter (199 F. Supp., p. 157). The complaint was dismissed on the ground of *res judicata*, based on the judgment in the State Court action. However, the Court also expressed its views on the merits of the claim. The Court reiterated the principles, discussed above at length, concerning the power of the States to establish voting standards. It pointed out that State requirements, such as absence of criminal conduct, residing within the State for a designated period, and passing of literacy tests in general, had all been held valid. Citing the *Lassiter* case, *supra*, the Court stated (p. 159):

> "While this case discussed the provision in the North Carolina statute requiring literacy and ignored the further requirement that it be in the English language, the above quotation is just as apposite for a person literate in a foreign tongue. The plaintiff

here is in no different position than children born in the United States and taken from the country at an early age and who return after reaching their majority and are 'literate' only in a tongue other than English. Plaintiff's argument, if carried to its logical conclusion, would mean that these people, no matter what their foreign tongue may be, should be entitled to vote as long as they are literate in such foreign tongue.

"The statute is not an unreasonable exercise of the powers of the State to provide requirements for exercising the elective franchise. It is not unreasonable to expect a voter not only to be conversant with the issues presented for determination in choosing between candidates for election, but also to understand the language used in connection with voting. For example, there are printed in English on the ballot synopses of proposed Constitutional amendments, titles of the offices to be filled and directives as to the use of the paper ballot or voting machine. Finally, what is more proper than that the voter be literate in the language used to conduct the business of government in his State."

Peculiarly enough, and of some significance to this case, in the Federal *Camacho* case, the Justice Department, by Burke Marshall, then Assistant Attorney General in charge of the Civil Rights Bureau and Robert M. Morgenthau, United States Attorney, filed a brief *amicus curiae* on behalf of the United States of America and in support of the constitutional validity of New York's English literacy requirement. In that brief the Justice Department argued first that the validity of English literacy requirements was decided by this Court in the *Lassiter* case, *supra*, but as to the general reasonableness and validity of such requirements the brief continued:

"Second, in any event, it cannot be said that the New York requirement which distinguishes between English and non-English speaking people is so un-

reasonable as to contravene the Constitution and the Civil Rights Act of 1957.

"One reasonable method for insuring an informed electorate in a country where English is, by far the dominant language, is to require that voters be able to read and write English. An informed electorate must have access to the myriad of conflicting viewpoints which contribute to the making of political decisions. In a country and State where the predominant and official language is English, it is reasonable to suppose that these views are more fully accessible to those who understand the English language.

"To be sure, Spanish language newspapers are published in New York City and are available to residents of the City and environs, but, at best, one wholly dependent upon such sources, however excellent they may be, is denied access to the great and varied body of the American press. In addition, the Court in considering this case must view the State of New York as a whole. Large areas of the State are not served by Spanish-language newspapers. Residents of these areas who are literate only in Spanish do not have available sufficient sources of information to permit them to qualify as informed electors.

"This case does not involve an interplay between discrimination in educational opportunity on the one hand and a literacy test as a prerequisite to voting on the other, for in New York educational facilities of very great scope and variety are available to all citizens regardless of race or color. Nor does it involve a tightening of literacy standards after one racial group has achieved electoral dominance."

The United States brief there also pointed out that when the English literacy requirement was inserted in the Constitution in 1922 there were only 7,719 Puerto Rican-born citizens in New York compared with 191,305 in 1950, and an estimated 610,000 in 1959, and that the literacy requirement "clearly was not aimed at Puerto Rican-Americans."

We have quoted here at such length from that brief because it aptly outlines many of the arguments in favor of the constitutionality of the New York literacy requirements. But to these arguments other considerations must be added.

In approving the suspension of literacy tests in *South Carolina* v. *Katzenbach*, *supra*, this Court described the origin of the literacy tests there involved, stating (34 L. W. p. 4209):

> "These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write."

In a footnote the opinion points to further evidence of the fact that the literacy tests there involved were initiated as part of a movement to disenfranchise Negroes (34 L. W. p. 4209).

No such evidence of intentional discrimination against any group can be shown with reference to New York's literacy requirement. Earlier in this brief we have detailed the legislative history of the New York law (*supra*, pp. 8-11). That history shows that these provisions were inserted in the law not to discriminate against any group but as a part of a program to reduce the illiteracy which had become startingly apparent in World War I and to promote industrial efficiency and safety. Broad Education Law amendments were adopted at the same time extending night schools for adults and additional training for minors between 16 and 21. New York's English literacy test was not and is not a vehicle for discrimination but rather what this Court in the *Lassiter* case, *supra*, described as a device related to the desire of the State "to

raise the standards for people of all races who cast the ballot" (360 U. S. at p. 54). It applies alike to persons of all races, creeds, colors, national or state origins and no suggestion has ever been made that New York's test is applied in a discriminatory manner. In fact, the test, administered by the State Board of Regents not by election boards, has been described as precluding discrimination "so far as is humanly possible" (McGovney, *The American Suffrage Medley* [1949] 62-64).

Subsequent to the *Camacho* cases, another action was commenced in Supreme Court, New York County, in 1964 (*Cardona* v. *Power*). That Court dismissed the petition, an appeal was taken to the State Court of Appeals which affirmed the dismissal (16 N. Y. 2d 639 [1965]) and a further appeal was taken to this Court and is now pending here (No. 673, this term).

On the record in this case it is argued that New York's English literacy requirement disenfranchises hundreds of thousands of Puerto Ricans living in New York City. There are, however, actually no facts in the record which indicate how many Puerto Ricans, otherwise eligible to vote in New York, are unable to do so solely because of New York's English literacy requirement. There are affidavits from several persons who refer to the numbers or percentages of persons in the area who speak Spanish; this, however, is not proof that these people do not also speak English.[2]

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[2] The consensus of the studies which have been undertaken in recent years is that the majority of Puerto Rican migrants do have some knowledge of written, as well as spoken, English. English is a required subject in Puerto Rican schools, beginning in the first grade (Clarence Senior, *Strangers Then Neighbors*, [Freedom Books, 1961] p. 58). In spite of the late start pupils generally get in Puerto

(Footnote continued on following page)

Of course, *if* the right to vote or demonstrate literacy in Spanish is a constitutional right, the numbers of persons involved is immaterial. But the issue of whether a requirement of English literacy creates an invalid classification or denies to any person equal protection of the laws may very well depend on numerical relationships. If 50 per cent of the adult population of the State were literate only in Spanish, then it would seem apparent that a limitation of the franchise to persons literate in English might be invalid as an unreasonable classification. Therefore, an examination of some relevant statistics may help to place the issue here involved in its proper perspective, i.e., by far the majority of eligible Puerto Rican residents of New York do register and vote and can comply with New York's English literacy requirement.

The 1960 census listed the total Puerto Rican population of all ages in New York State at 642,622 (United States Census of Population, 1960; *Puerto Ricans in the United States*, Table 6). Of this total, 194,037 had been born on the mainland and may be presumed literate in English, if adults. In 1960, approximately half the total population (344,836) were 20 years of age or older. The figures as to New York City alone show a 1960 population of 612,574, of which total 182,864 were mainland born.[8]

(Footnote continued from preceding page)

Rican schools (the average beginning age is between 6 and 8 as compared with 5½ to 6½ on the mainland), the typical island-schooled child, even though a relatively recent arrival in mainland schools did exhibit ability to read English, even in lower elementary grades (*Who Are the Puerto Rican Pupils in the New York City Public Schools?*, Puerto Rican Study Research Report, Board of Education City of New York, 1956, pp. 30, 50).

[8] *The Puerto Rico Problem*, Edward B. Lockett, p. 186 (Exposition Press, 1964).

If the same percentages apply to the City as to the State as a whole, approximately 300,000 Puerto Ricans in New York City were of voting age in 1960. Adopting the 60% estimate for completion of a 7th grade education in any language (R. 75), approximately 200,000 Puerto Ricans would have been eligible to vote in New York in 1960 if literacy in either English or Spanish were permitted.

Actual Puerto Rican political participation has increased greatly in recent years. Clarence Senior, former director of the Social Science Research Center of the University of Puerto and now a member of the New York City Board of Education, in his book "Strangers Then Neighbors" (Freedom Books, 1961) points out (p. 69):

> "The Puerto Rican vote in New York City rose from about 35,000 in the 1954 election to about 85,000 in 1956. In 1960, as the result of an intensive registration campaign carried out through the combined efforts of the Commonwealth of Puerto Rico's Migration Division, Puerto Rican community groups, the Spanish-language press, radio, and theatres, and the political parties, total Puerto Rican and Hispanic registration in New York City rose to 230,000 (*New York Times*, November 2, 1960)—a remarkable achievement for a group the majority of whose members have been in New York for less than a decade."

These registration totals were reached at a time when the City Board of Elections complied with State law and required proof of literacy in English. These registration figures are supported by voting figures in the 1961 New York City mayoralty election.

> "San Juan's lady mayor, Felissa Rincon de Gautier, herself came to New York to campaign vigorously for Wagner, and to ride attentive herd on the New York City Puerto Rican vote. On Wagner's election, she hailed his victory as the 'birth of real Puerto Rican

bloc voting' on the mainland. She reported that of New York's approximately 750,000 first and second generation Puerto Ricans of all ages, 200,000 had cast votes, and had balloted 9 to 1 for Wagner.'"[4]

From these facts it is apparent that New York's English literacy requirement has not resulted in the disenfranchisement of all or even a substantial majority of Puerto Rican residents of New York. This conclusion is further substantiated by the fact that after the enactment of § 4(e) only a relatively small number of Puerto Ricans registered in the City of New York although the Board of Election publicly announced that it would follow the provisions of § 4(e) rather than State law.[5]

New York has long been the major port of entry into this country of people from abroad, many of whom settled permanently in New York and, while enriching the State with the contributions of their various cultures, also provided the State with a population of foreign born or foreign educated persons unequaled numerically in any other State of the Union.[6] What is more natural and reasonable under such circumstances than that the State, with an aim toward integration of these diverse groups into the structure of American political culture, as well as socially and economically, require its voters to be literate in English?

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[4] *The Puerto Rico Problem*, Edward B. Lockett (Exposition Press, Inc. 1964), p. 53.

[5] Only 8,107 Puerto Ricans registered in 1965 under § 4(e), as contrasted to pre-registration estimates of 300,000. *N. Y. Times*, Nov. 16, 1965, p. 38.

[6] The census of 1960 showed that 19 per cent of the population of New York City were still foreign-born, 28 per cent were children of foreign-born parents, 8 per cent were of Puerto Rican birth or parentage. *Beyond the Melting Pot*, Nathan Glazer and Daniel Patrick Moynihan, (M. I. T. Press, 1963), p. 7.

An inability to speak, read or write English deprives a voter of access to the great mass of political comment and information as to political and governmental issues of the day. It leaves him dependent upon a few sources of information which may be available in his own language and which may reflect partisan political prejudices and beliefs. For the most part, such a voter is also deprived of contact with, access to, and direct evaluation of the candidates themselves. In certain election districts local candidates do campaign in languages other than English. But candidates for city-wide, state-wide or national offices seldom have the varied language backgrounds necessary to reach voters in the many different languages spoken by identifiable national groups in this State.

Of some significance also on this point is the fact that not only are the ballots printed in English, but also the instructions for voters and the synopses of the propositions, referenda and State Constitutional amendments to be voted upon. In the November election last year voters were called upon to vote on 3 propositions authorizing State indebtedness, a question on the calling of a State constitutional convention, and 9 proposed amendments to the State Constitution. Furthermore, a voter is entitled to ask for assistance from the inspectors of election. If voter and election officials cannot communicate with each other in a common language, the voter's attempt to exercise his franchise may be frustrated as a practical matter.

Consequently, we submit that New York's English literacy requirement is just and reasonable, it does not unfairly discriminate against any group of citizens and violates no provision of the Fourteenth Amendment. Section 4(e), therefore, does not constitute "appropriate" legislation under that amendment.

POINT III

The power of Congress to govern the territories does not authorize the enactment of a statute applying to no territory but affecting only the internal laws of the States, enacted under constitutional authority, which apply in a non-discriminatory manner to all citizens alike.

While not encompassed within the pleadings, the defendants advanced, on oral argument in the Court below, the theory that if Congress could not enact § 4(e) under the Fourteenth Amendment, the statutory provision could be sustained as an exercise of the power of Congress to legislate for the territories under Article IV, § 3, of the Constitution, which authorizes Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". The same argument has been raised by appellants on this appeal. It is contended that since § 4(e) relates to citizens of the United States *who had been* residents of Puerto Rico, the power of Congress to legislate for the Government of Puerto Rico includes the authority to enact this provision. In making this argument, appellants contend that the power to govern the territories extends beyond the geographical boundaries of the territory and enables Congress to enact legislation at will regulating the States and conferring rights on or restricting rights of American citizens who were at one time resident in Puerto Rico. In rejecting this argument, the Court below held (R. 90):

> "There are two answers to this contention. First, Section 4(e) is broad and comprehensive in its terms and is neither limited to nor directed solely to Puerto Ricans and, therefore cannot be deemed an exercise of the power to legislate for Puerto Rico. Second, and more important, the power of Congress to legislate for

a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States. The Congress may not endow them with rights not possessed by other citizens of the State to which they have moved."

In support of their contentions, appellants cite the long history of special legislation applying to Puerto Rico and other territories. However, this legislation uniformly has related to the government of the territory itself, the personal and political rights of residents of the territory while within the territory, or the raising of revenue for the benefit of the territory even when raised outside the geographical bounds of the particular territory. *Significantly, none of this legislation has purported to regulate the States or to prohibit State exercise of constitutionally reserved powers.* Section 4(e), however, does precisely that. It does not purport to govern the Territory of Puerto Rico or determine status or rights of residents of the Commonwealth. Instead, it acts as a legislative limitation upon the constitutionally reserved right of the States to determine the qualifications of electors in the States.

In considering that argument the power to enact § 4(e) should be viewed in the light of the precise wording of the constitutional provision providing for the government of the territories. Article IV, § 3, grants to Congress the power to make "needful Rules and Regulations respecting the Territory * * * belonging to the United States". It does not grant Congress any similar power to govern the States. Appellants argue that Congress regulates the States in requiring them to accept territorial citizens as citizens of the United States, but that regulation is inherent in citizenship status under the Constitution, a status conferred upon citizens of the territories *in situ*, within the

territory, and, as in the case of all American citizens, a status carried with them as they move into any State.

The power of Congress as it relates to the territories has been frequently described by the Courts. It has been said to be a plenary power (*National Bank* v. *County of Yankton*, 101 U. S. 129 [1879]; *Cases* v. *United States*, 131 F. 2d 916 [C. C. A., 1st Cir., 1942], cert. den. 63 S. Ct. 1431) and supreme power (*Murphy* v. *Ramsey*, 114 U. S. 44 [1885]). The distinction between the power of Congress to regulate the territories and its power to legislate with reference to the States has also been the subject of judicial scrutiny. In *Cincinnati Soap Co.* v. *United States* (301 U. S. 308 [1937]), this Court held (p. 323):

> "In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States, considered as a political body of states in union."

Again in *Hooven & Allison Co.* v. *Evatt* (324 U. S. 652 [1945]), this principle was reiterated in the holding (p. 674):

> "In exercising this power [to govern the territories], Congress is not subject to the same constitutional limitations, as when it is legislating for the United States."

The converse of this is also true. When Congress legislates as to the States, it *is* limited by constitutional restrictions. Section 4(e) governs the States, not the territories.

The nature of the Congressional power in relation to the terrritories is distinct, not only in extent but in kind. As to the States, Congress acts only as a Federal legislature, but as to the territories its power is unique.

At the end of the last century, the Supreme Court described this peculiar power (*Simms* v. *Simms*, 178 U. S. 162 [1899]), stating (p. 168):

> "In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power in the legislative assembly of a Territory."

The limitations upon and extent of the power of Congress in governing the territories was dealt with at some length in a case involving qualifications of voters in a territory (*Murphy* v. *Ramsey, supra*). An Act of Congress had denied the right of suffrage to inhabitants of Utah who were parties to bigamous or polygamous marriages. In upholding the statute, the Court held (114 U. S. at pp. 44-45):

> "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall par-

> ticipate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

The determination of the qualifications of voters in a State is the province solely of the State government; it is a power reserved to the States. Consequently, when Congress enacts voter qualification statutes for the territories, it acts not as the Federal legislature but in an exercise of the State legislative powers it possesses as to the territories. If, as alleged, § 4(e) was enacted under the power of Congress to govern the territories, has only the force and effect of a State law. Its validity depends upon whether a State legislature could enact such a statute applying only to other States. If § 4(e) is a valid exercise of the power of Congress to regulate the territories, then a State having no literacy test (such as Florida) could pass legislation granting to its residents the right to move to another State and vote there without being subjected to any literacy requirements.

If Congress may under its power to govern the territories, give special status to former residents of Puerto Rico after they come to the mainland, then Congress could

require the States to recognize professional licenses granted by the Government of Puerto Rico without regard to the State's qualifications for its own residents, or provide that residents of Puerto Rico may practice law before any Court in the United States in Spanish and without being admitted to practice therein.

It is argued that § 4(e) is in furtherance of an affirmative Congressional policy to foster use of Spanish as the predominant classroom language in Puerto Rico; that it is a part of the policy of the Federal government to make Puerto Rico the "Showplace of Latin America". Parenthetically, it may be observed that from the history of the language of teaching in the Puerto Rican schools, as outlined in Appellants' brief, the selection of Spanish as the language of teaching was not the result of any affirmative Congressional policy, but rather the result of a *laissez faire* attitude toward the administrative government of Puerto Rico. Be that as it may, however wisely conceived a policy may be from State Department standards, the development of such a policy does not authorize restrictions by Congressional enactment upon the constitionally reserved powers of the States. As this Court said in a case relating to trials of American citizens abroad (*Reid* v. *Covert*, 354 U. S. 1, 14 [1954]):

> "If our foreign commitments become of such nature that government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there."

Nor can it be conclusively said that the status of Puerto Rico as the "Showplace of Latin America" requires Spanish language instruction. Samoa has, in recent years, become the showplace of the Pacific and there heavy emphasis

is placed upon the use of English even in elementary teaching (Clarence Hall, *Samoa: America's Showplace of the South Seas*, Reader's Digest, November, 1965, p. 157 *et seq.*).

It is clear that Congress, in enacting § 4(e), was not governing the Commonwealth of Puerto Rico or any other territory. It was instead determining what qualifications the States could require of their own resident voters based solely upon the prior place of residence of a selected group of prospective voters. This type of regulation is not within either the power of Congress to govern the Territories or its power under the Fourteenth Amendment.

POINT IV

Section 4(e) is itself discriminatory in that it prefers one class of native-born citizens over another.

Section 4(e) specifically applies only to citizens whose education in a language other than English was in American-flag schools. That section would invalidate New York's English literacy requirements as to that single class of persons. In so doing, however, it would deny the equal protection of the laws to other native-born citizens who were not literate in English.

A native-born citizen reared abroad and educated in a foreign language would still be required to demonstrate literacy in English in order to qualify to vote, although a Puerto Rican or resident of any territory of the United States, no more or less a citizen and no more or less proficient in English, would not have to do so.

True, § 4(e) sets up a distinct class of citizens and treats members of that class equally, but mere classification does not establish equal protection. As the United States Su-

preme Court reminds us in *Carrington* v. *Rash*, *supra* (p. 93):

> "'The court must reach and determine the question whether the classifications drawn in a statute are reasonable in the light of its purpose * * *.' *McLaughlin* v. *Florida*, 379 U. S. 184, 191."

A classification deliberately applying to only one group of native-born citizens, educated in a language other than English, provides no reasonable basis for the exclusion of other groups of citizens whose education may similarly have been in a language other than English.

Today, New York's English literacy requirement applies equally to *all* voters. Under the Federal law, an artificially created and arbitrary class of citizens would be excluded from that requirement.

No more discriminatory or unequal provision of law could be conceived. The act itself establishes discrimination where none previously existed. The statute would have to be held unconstitutional on this ground alone.

CONCLUSION

The order and judgment of the Court below should for the foregoing reasons be affirmed.

Dated: March 31, 1966.

Respectfully submitted,

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October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, etc.,
Appellant,

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTARY AND REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, etc.,
Appellant,

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTARY AND REPLY BRIEF FOR APPELLANT

Appellees contend that the Equal Protection Clause is not an "open-end cornucopia of federal power," that it is wrong to use it "as a peg on which to hang decision • • • thus deceiving the public" and "by-passing the political process," and that "a judiciary which amends a constitution under the guise of construing it" will eventually find its decisions swept "into the ash can of history" (Appellees' Br., p. 20; Appendix "Literacy Tests, the Fourteenth Amendment and District of Columbia Voting: the Original Intent," pp. 2, 5).

Claiming that since an English-literacy requirement has already been upheld by this Court as a valid state voter qualification (*Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45 [1959]), appellees, joined by the Attorney General of the State of New York, urge that Congress has no power to reject such standard as a curtailment of fundamental rights violative of the Equal Protection Clause. As to the internationally accepted standards to which this Nation has subscribed—proscribing denial of fundamental rights on the basis of race, sex, language or religion (Article 55, Charter of the United Nations)—the Attorney General says that this was rejected in *Camacho* v. *Rogers*, 199 F. Supp. 155 [1961] (Amicus Br., p. 33). It is also said that "no agreement with a foreign nation can confer power on the Congress * * * which is free from the restraints of the Constitution," citing *Reid* v. *Covert*, 354 U. S. 1, 16 [1957] (Appellees' Br., p. 20; Amicus Br., p. 47). In short, "the Tenth Amendment is clear; powers not delegated to the federal government are reserved to the states" (Appellees' Br., p. 20), and it is the "constitutionally reserved right of the States to determine the qualifications of electors in the States" (Amicus Br., pp. 43, 47).

Appellant Board of Elections has sufficiently briefed the point that Congress has the primary responsibility for determining whether or not state-fixed voter qualifications are based on standards that effectively secure, or actually deny, basic rights of suffrage in violation of the Equal Protection Clause, and of taking appropriate remedial action where such violation is found (City's Main Br., pp. 7-15). As to the contention that in *Camacho* v. *Rogers*, 199 F. Supp.155 (1961), the Court rejected Article 55 of the

Charter of the United Nations and the standards therein acceded to by 117 nations, that rejection was predicated solely on the proposition that the Article was not self-executing but required Congressional action for its effectuation. As will be shown, acceptance of Article 55 pursuant to the treaty-making power, and the execution thereof, are not violative of any constitutional restraints upon federal power since that Article neither (a) diminishes any of the rights of the individual secured by the Constitution, nor (b) usurps any of the "constitutionally reserved powers of the States" (Amicus Br., p. 47).

a. Accession to Article 55 represents a valid exercise of the treaty-making power since it infringes none of the rights of individuals secured by the Constitution.

As has been held by this Court, while the treaty-making power "does extend to all proper subjects of negotiation between our government and other nations. *Geofroy* v. *Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri* v. *Holland*, 252 U. S. 416"—it "does not extend 'so far as to authorize what the Constitution forbids'" (*Asakura* v. *Seattle*, 265 U. S. 332, 341 [1924]). Thus, as stated in *Reid* v. *Covert*, 354 U. S. 1, 22 (1957), where the Constitution imposes restraints upon Congress, requiring "that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions," a Status of the Armed Forces agreement with another nation, authorizing military trial of civilians, "is inconsistent with both the 'letter and spirit of the constitution'." And (*ibid.*, at p. 40), "[w]e should not break faith with this Nation's tradition of keep-

ing military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution." Hence, such treaty "[h]aving run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper clause cannot extend the scope of clause 14" authorizing Congress to regulate "the land and naval forces" (at p. 21).

This appellant contends, however, that the international obligation assumed by this Nation, in Article 55, *i.e.*, to effectuate "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (58 Stat. 1045) is consistent with both the letter and the spirit of this Nation's Constitution, and that there is, in fact, an inner unity between them that secures all the more effectively the fundamental human rights which it was the object of the Bill of Rights to safeguard. Prior to subscribing to the Charter of the United Nations, the United States had recognized, on the basis of a recent and devastating world war, that unless these fundamental human rights could be secured for the people of all nations, free of the discriminatory tenets upon which undemocratic forces thrive, the recent experience that gave rise to the U. N. would have been in vain.

It was, in fact, the United States and its three principal allies that formulated the Charter at Dumbarton Oaks, in 1944, to which the 51 original members subsequently subscribed at San Francisco the following year. And as stated in the Preamble to the Charter, the motivating force therefor was the determination of "The People of the United Nations"—"to save succeeding generations from the

scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (Preamble to the Charter of the United Nations). Each member nation pledged itself to "fulfill in good faith the obligations assumed by them in accordance with the present Charter," and to take "joint and separate action" for the "achievement of the purposes set forth in Article 55" (Arts. 2, §2; 56).

It is obvious that none of the specific rights of the individual, safeguarded to the people by the Bill of Rights, by subsequent amendments to the Constitution, or by that fundamental law itself are in the least infringed, threatened or diluted by the provisions of Article 55 of the Charter of the United Nations, invoked herein as a valid exercise of the treaty-making power fully supporting Congressional execution, via Section 4(e) of the Voting Rights Act of 1965, of the obligation undertaken by the Nation in subscribing thereto (*Neeley* v. *Henkel* [No. 1], 180 U. S. 109, 121 [1901]). To the contrary, the "treasured constitutional protections" of the individual (*Reid* v. *Covert*, 354 U. S. 1, 21 [1957]), are strengthened by that treaty to the extent that all member nations of the United Nations fulfill their obligations to observe "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion", thereby promoting truly representative government in contrast to the military governments de-

plored in *Reid* v. *Covert, supra,* at p. 40, and which obviously pose a threat to peace and derogate from "human rights and fundamental freedoms."

But in addition to being consistent with the *express* constitutional rights of the individual, it is equally clear that the *spirit* of the Constitution is not violated by the provisions of Article 55. It can scarcely be doubted that representative government by the people is the bedrock purpose of the system of government created by that document, and that under the Constitution "each and every citizen has an inalienable right to full and effective participation in the political processes" of his state and Nation (*Reynolds* v. *Sims,* 377 U. S. 533, 565 [1964]). Insofar as the Constitution can be said to have been based on political compromise, tolerating slavery and deprivation of fundamental rights on the basis of state classifications of citizens of the United States, subsequent amendments thereto, and particularly the Fourteenth Amendment, have secured to every citizen immunity from discriminatory denial of fundamental rights inclusive of the most basic right of all, that of suffrage (City's Main Br., pp. 7-15).

The intent of the framers of the Constitution was "to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses" (*United States* v. *Classic,* 313 U. S. 299, 316 [1940]; see, *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 443 [1934]). And that instrument "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues" (*Hur-*

tado v. *California,* 110 U. S. 516, 530-1 [1884]). Insofar as the fundamental rights of the individual are secured by the Constitution, Article 55 derogates from neither the letter nor the spirit thereof.

b. The powers reserved to the states can neither defeat the sovereignty of the United States nor a treaty undertaken to preserve peace by securing basic rights of mankind.

Since it is clear that none of the rights of the individual secured by the Constitution are in any way diluted or jeopardized by Article 55 of the Charter, it remains but to determine whether the rights and powers reserved to the states by the Constitution have been usurped by the treaty. Where the constitutional rights of the individual were not involved, the only question being the possible infringement of powers reserved to the states by the Tenth Amendment, this Court stated, with respect to the supremacy of a treaty under Art. VI, §2 (*Missouri* v. *Holland,* 252 U. S. 416, 434 [1920]): "[t]he only question is whether it is forbidden by some radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."

In *Missouri* v. *Holland, supra,* legislation enacted in enforcement of a treaty was upheld despite constitutional restraints upon federal power over commerce, which, in the absence of treaty, had been held to bar such legislation. As stated by this Court with respect to the powers reserved to the states by the Tenth Amendment (*United States* v. *Darby,* 312 U. S. 100, 124 [1940]), "[t]he amendment states

but a truism that all is retained which has not been surrendered." The power to enter into a treaty with a foreign nation having been surrendered to the United States, the only question is whether Article 55 represented a valid exercise of the treaty-making power.

It is obvious that no state could have acted in the interests of preserving its citizenry from another world holocaust, such as had been experienced at the time the United States acceded to the Charter of the United Nations, by initiating and acceding to treaty provisions designed to promote and secure basic human rights and freedoms for all people so as to encourage representative governments and preserve peace in accordance with international law. As "a member of the family of nations, the right and power of the United States * * * are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 [1936]). Clearly, only the United States could have layed a foundation for preserving the Nation, the states thereof and the basic constitutional rights of the people via a treaty creating a permanent international organization to preserve peace and to promote and encourage "respect for human rights and for fundamental freedoms for all" (Charter, Art. 1, §3; Arts. 55-56).

In *Missouri* v. *Holland*, 252 U. S. 416, 435 (1920), this Court recognized that the individual states were powerless to effect the preservation of birds since the active cooperation of another nation was required, saying (at p. 435): "[h]ere a national interest of very nearly the first magnitude is involved. It can be protected only by national action

in concert with that of another power." With actual experience of the havoc that various doctrines of racial, national and cultural superiority can lead to on the international scene, and with the ultimate in weaponry available to mankind, it is clear, that at least the same can be said of the preservation of mankind, i.e., that unless concerted action be taken to encourage observation of basic human rights and freedoms by the nations of the world, peace, as a national interest of the first magnitude, would be jeopardized. In short, it was proper and fitting, and a valid exercise of the treaty-making power, to accede to Article 55 of the Charter, the individual states of the Nation being incompetent and powerless thereto. "If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const. art. 1 sect. 10" (*Hauenstein* v. *Lynham*, 100 U. S. 483, 490 [1879]; see, also, *Kolvorat* v. *Oregon*, 366 U. S. 187, 197-8 [1961]; *Hines* v. *Davidowitz*, 312 U. S. 52, 67-8 [1941]; *Asakura* v. *Seattle*, 265 U. S. 332, 341 [1924]).

"Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate." *United States* v. *Belmont*, 301 U. S. 324, 331-2 (1937); see, *Missouri* v. *Holland*, 252 U. S. 416, 432 (1920); *Neeley* v. *Henkel* (No. 1), 180 U. S. 109, 121 (1901); *Chew Hong* v. *United States*, 112 U. S. 536, 540 (1884); *Gibbons* v. *Ogden*, 9 Wheat. 1, 210-11 (1824). And "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink*, 315 U. S. 203, 230-1 (1942).

Thus, the supremacy accorded a valid exercise of the treaty-making power (Art. VI, §2) provides a firm pillar of support for Section 4(e) of the Voting Rights Act of 1965, since fulfilling the obligations assumed under Article 55 of the Charter of the United Nations infringes none of the constitutionally guaranteed private rights of the people —which rights "go to the roots" of all power—nor does it represent a constitutionally invalid curtailment of state power to classify citizens of the United States for purposes of bestowing or denying basic rights of citizenship. See, *Constitution of the United States of America* (1963), pp. 479, 481, Library of Congress.

As to the Attorney General's contention (Amicus Br., p. 48), that "[s]ection 4 (e) is itself discriminatory in that it prefers one class of native-born citizens over another," suffice it to say that (1) the "Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power" [*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (1937)]; and (2) Article 55 clearly leaves to legislative discretion the time at which, and the extent to which, its provisions shall be enforced.

"So while the right of suffrage is established and guaranteed by the Constitution (cases cited) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers has imposed" (*Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50 [1959]). The restrictions upon state-imposed discriminatory standards with respect to the right of suffrage, contained in Section 4(e), were enacted pursuant to a valid

exercise of constitutional powers (Art. VI, cl. 2; Art. I, §8, cl.18; Fourteenth Amendment, §§1, 5; Art. IV, §3), and that section of the Voting Rights Act of 1965 should be declared constitutional.

CONCLUSION

The order appealed from should be reversed and Section 4(e) of the Voting Rights Act of 1965 declared a valid enactment.

April 13, 1966

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 847 and 877.—October Term, 1965.

Nicholas de B. Katzenbach, Attorney General of the United States, et al., Appellants, 847 *v.* John P. Morgan and Christine Morgan. New York City Board of Elections, etc., Appellants, 877 *v.* John P. Morgan and Christine Morgan.	On Appeals From the United States District Court for the District of Columbia.

[June 13, 1966.]

Mr. Justice Brennan delivered the opinion of the Court.

This case concerns the constitutionality of § 4 (e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in this case, provides that no person who has successfully completed the sixth primary grade in a

[1] The full text of § 4 (e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall

public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) insofar as it *pro tanto* prohibits the enforcement of the election laws of New York [2] re-

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demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English." 79 Stat. 437, 439, 42 U. S. C. § 1973b (e) (1964 ed. Supp. I).

[2] Article II, § 1, of the New York Constitution provides, in pertinent part:

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law provides, in pertinent part:

". . . In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the State of New York shall make provisions for the giving of literacy tests.

. . . . .

"2. . . . But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up

quiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4 (e) insofar as it would enable many of these citizens to vote.[2] Pursuant to § 14 (b) of the Vot-

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to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4 (e) was under consideration in Congress. See 111 Cong. Rec. 18664 (Aug. 4, 1965). The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

[2] This limitation on appellees' challenge to § 4 (e), and thus on the scope of our inquiry, does not distort the primary intent of § 4 (e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of larger segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4 (e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong. Rec. 10643–10644 (May 19, 1965), 10675–10689 (May 20, 1965), 15101–15102 (July 6, 1965), 15665–15676, 15712–15713 (July 9, 1965), 18490–18499 (Aug. 3, 1965), 18663–18665 (Aug. 4, 1965); see also Voting Rights, Hearings before Subcommittee No. 5 of the Committee on the Judiciary on H. R. 6400, House of Representatives, 89th Cong., 1st Sess., 100–101, 420–421, 508–517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of § 4 (e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the

ing Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of Columbia seeking a declaration that § 4 (e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with § 4 (e).[4] A three-judge district court was designated. 28 U. S. C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4 (e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F. Supp. 196. Appeals were taken directly to this Court, 28 U. S. C. §§ 1252, 1253 (1964 ed.), and we noted probable jurisdic-

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schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

[4] Section 14 (b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue . . . any restraining order or temporary or permanent injunction against the . . . enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto." 79 Stat. 437, 445, 42 U. S. C. § 1973*l* (b) (1964 ed. Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4 (e); it has taken the position in these proceedings that § 4 (e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4 (e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U. S. C. § 2403 (1964 ed.); Fed. Rule Civ. Proc. 24 (a).

tion. 382 U. S. 1007. We reverse. We hold that, in the application challenged in this case, § 4 (e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[5] and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4 (e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U. S. 651, 663. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such

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[5] "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4 (e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, § 3; see dissenting opinion of Judge McGowan below, 247 F. Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1899, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56; Art. I, § 8, cl. 18. Nor need we consider whether § 4 (e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor* v. *Happersett*, 88 U. S. 162, 171; *United States* v. *Classic*, 313 U. S. 299, 315; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306–311 (1962) (brief of the Attorney General); nor whether § 4 (e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. 1, § 8, cl. 18.

exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4 (e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4 (e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.[7] As was said with regard to § 5 in *Ex parte Virginia*, 100 U. S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amend-

[6] *Harper* v. *Virginia Board of Elections*, 383 U. S. 663; *Carrington* v. *Rash*, 380 U. S. 89. See also *United States* v. *Mississippi*, 380 U. S. 128; *United States* v. *Louisiana*, 380 U. S. 145, 151; *Lassiter* v. *Northampton Education Bd.*, 360 U. S. 45; *Pope* v. *Williams*, 193 U. S. 621, 632–634; *Minor* v. *Happersett*, 88 U. S. 162; cf. *Burns* v. *Richardson*, 384 U. S. 73, 92; *Reynolds* v. *Sims*, 377 U. S. 533.

[7] For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interest in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356–1357; Harris, The Quest for Equality, 33–56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–217 (1951).

ments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U. S. 261, 282–284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amend-

[8] Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

ments, is inapposite. Compare also *Guinn* v. *United States*, 238 U. S. 347, 366; *Camacho* v. *Doe*, 31 Misc. 2d 692, 221 N. Y. S. 2d 262, aff'd 7 N. Y. 2d 762, 163 N. E. 2d 140; *Camacho* v. *Rogers*, 199 F. Supp. 155 (D. C. S. D. N. Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Ex parte Virginia, 100 U. S., at 345–346, decided 12 years after the adoption of the Fourteenth Amendment,

[9] In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

held that congressional power under § 5 had this same broad scope:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

Strauder v. *West Virginia*, 100 U. S. 303, 311; *Virginia* v. *Rives*, 100 U. S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the state." That test was identified as the one formulated in *McCulloch* v. *Maryland*. See also *James Everards' Breweries* v. *Day*, 265 U. S. 545, 558–559 (Eighteenth Amendment). Thus the *McCulloch* v. *Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether

it is not prohibited by but is consistent with "the letter and spirit of the Constitution." [10]

There can be no doubt that § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4 (e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4 (e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4 (e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4 (e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that

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[10] Contrary to the suggestion of the dissent, *infra*, p. 10, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

"is preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Section 4 (e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There

[11] Cf. *James Everards' Breweries* v. *Day*, *supra*, which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the *Shreveport Case* (*Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342), and expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ." Accord, *Atlanta Motel* v. *United States*, 379 U. S. 241, 258.

plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether § 4 (e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the inter-

[12] See, *e. g.*, 111 Cong. Rec. 10676, 10680 (May 20, 1965), 15671 (July 9, 1965); Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–508.

[13] The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, *supra*.

[14] This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races . . . . The danger has begun. . . . We should check it." 3 New York State Constitutional Convention 3012) (Rev. Record 1916).

See also *id.*, at 3015–3017, 3021–3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States, 102, 237, 269–282 (1954 ed.). Congress was aware of this evidence. See, *e. g.*, Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–513; Voting Rights, House Hearings, n. 3, *supra*, 508–513

ests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Con-

[15] Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev. Laws § 11–38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N. Y. Election Laws § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see *e. g.*, Fla. Stat. Ann., 1960, §§ 97.061, 101.061 (form of personal assistance); New Mexico Stat. Ann., 1953, §§ 3–2–11, 3–3–13 (personal assistance for those literate in no language), §§ 3–3–7, 3–3–12, 3–2–41 (ballots and instructions authorized to be printed in English or Spanish). Section 4 (e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see, *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89, 96; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670; *Thomas* v. *Collins*, 323 U. S. 516, 529–530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4; *Meyer* v. *Nebraska*, 262 U. S. 390; and Congress is free to apply the same principle in the exercise of its powers.

[16] See, *e. g.*, 111 Cong. Rec. 10675 (May 20, 1965), 15102 (July 6, 1965), 15666 (July 9, 1965). The record in this case includes affi-

gress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina* v. *Katzenbach, supra,* to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discriminaton in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the Constitution." The only respect in which appellees contend that § 4 (e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language

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davits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish speaking areas.

[17] See, *e. g.*, 111 Cong. Rec. 10676 (Senator Long of Louisiana and Senator Young), 10678 (Senator Holland) (May 20, 1965), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4 (e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected in § 4 (e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have § 4 (e) invalidated on this ground, see generally *United States* v. *Raines*, 362 U. S. 17, since the argument, in our view, falls on the merits.

Section 4 (e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4 (e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, *supra*, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone further than it did," *Roschen* v. *Ward*, 279 U. S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners*, 294 U. S. 608, 610, and that "reform may take one step at a time,

addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4 (e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4 (e) may, for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools, [18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4 (e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no further than it did."

We therefore conclude that § 4 (e), in the application challenged in this case, is appropriate legislation to en-

[18] See, *e. g.*, 111 Cong. Rec. 10675 (May 20, 1965).

[19] See Magruder, The Commonwealth Status of Puerto Rico, 15 Pitt. L. Rev. 1 (1953).

[20] See, *e. g.*, 111 Cong. Rec. 10675, 10680, 10688 (May 20, 1965), 15666 (July 9, 1965). See Osuna, A History of Education in Puerto Rico (1949).

[21] See, *e. g.*, 111 Cong. Rec. 15666 (July 9, 1965); Voting Rights, House Hearings, n. 3, *supra*, 362. See also Jones Act of 1917, 39 Stat. 951, 953, conferring United States citizenship on all citizens of Puerto Rico.

force the Equal Protection Clause and that the judgment of the District Court must be and hereby is

Reversed.

MR. JUSTICE DOUGLAS joins the Court's opinion except for the discussion, at pp. 14–16, of the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the Constitution." On that question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

SUPREME COURT OF THE UNITED STATES

Nos. 847, 877 AND 673.—OCTOBER TERM, 1965.

Nicholas de B. Katzenbach, Attorney General of the United States, et al., Appellants, 847 *v.* John P. Morgan and Christine Morgan. New York City Board of Elections, etc., Appellants, 877 *v.* John P. Morgan and Christine Morgan.	On Appeals From the United States District Court for the District of Columbia.
Martha Cardona, Appellant, 673 *v.* James M. Power et al.	On Appeal From the Court of Appeals of the State of New York.

[June 13, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Worthy as its purposes may be thought by many, I do not see how § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973b (e) (Supp. I, 1965), can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers *only* in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

I.

The Cardona Case (No. 673).

This case presents a straightforward Equal Protection problem. Appellant, a resident and citizen of New York, sought to register to vote but was refused registration because she failed to meet the New York English literacy qualification respecting eligibility for the franchise.[1] She maintained that although she could not read or write English, she had been born and educated in Puerto Rico and was literate in Spanish. She alleges that New York's statute requiring satisfaction of an English literacy test is an arbitrary and irrational classification that violates the Equal Protection Clause at least as applied to someone who, like herself, is literate in Spanish.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, *Minor* v. *Happersett*, 21 Wall. 162; *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, *e. g.*, the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments,[2] and, as more recently decided, to the general principles of the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U. S. 533; *Carrington* v. *Rash*, 380 U. S. 89.

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[1] The pertinent portions of the New York Constitution, Art. II, § 1, and statutory provisions are reproduced in the Court's opinion, *ante*, pp. 2–3, n. 2.

[2] The Fifteenth Amendment forbids denial or abridgment of the franchise "on account of race, color, or previous condition of servitude"; the Seventeenth deals with popular election of members of the Senate; the Nineteenth provides for equal suffrage for women; the Twenty-fourth outlaws the poll tax as a qualification for participation in federal elections.

The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61; *Walters* v. *City of St. Louis*, 347 U. S. 231.

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see *ante*, p. 13, note 15; dissenting opinion of DOUGLAS, J., in *Cardona*, *ante*, p. 3, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it does.

In 1959, in *Lassiter* v. *Northampton Election Bd.*, *supra*, this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications

of this sort. 360 U. S., at 51. Dealing with literacy tests generally, the Court there held:

> "The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . . It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith*, 159 Mass. 413–414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards." 360 U. S., at 51–53.

I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy *per se* and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which . . . provide proportionately more coverage of government and politics than do most English-language newspapers," and that she listens to Spanish-language radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests *per se* as a condition of voting, application of such a test to one literate in Spanish, in

the context of the large and politically significant Spanish-speaking community in New York, serves no legitimate state interest, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in English, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U. S. C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex,[3] that it is fairly adminis-

[3] The test is described in McGovney, The American Suffrage Medley 63 (1949) as follows: "The examination is based upon prose compositions of about ten lines each, prepared by the personnel of the State Department of Education, designed to be of the level of reading in the sixth grade . . . . These are uniform for any single examination throughout the State. The examination is given by school authorities and graded by school superintendents or teachers under careful instructions from the central authority, to

tered,[4] and that New York maintains free adult education classes to which appellant and members of her class are encouraged to attend.[5] Given the State's legitimate

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secure uniformity of grading as nearly as is possible." The 1943 test, submitted by the Attorney General of New York as representative, is reproduced below:

NEW YORK STATE REGENTS LITERACY TEST
(To be filled in by the candidate in ink)

Write your name here.....
First name Middle initial Last name
Write your address here.....
Write the date here.....
Month Day Year

Read this and then write the answers to the questions
Read it as many times as you need to

The legislative branch of the National Government is called the Congress of the United States. Congress makes the laws of the Nation. Congress is composed of two houses. The upper house is called the Senate and its members are called Senators. There are 96 Senators in the upper house, two from each State. Each United States Senator is elected for a term of six years. The lower house of Congress is known as the House of Representatives. The number of Representatives from each state is determined by the population of that state. At present there are 435 members of the House of Representatives. Each Representative is elected for a term of two years. Congress meets in the Capitol at Washington.

The answers to the following questions are to be taken from the above paragraph

1 How many houses are there in Congress? .....
2 What does Congress do? .....
3 What is the lower house of Congress called ?.....
4 How many members are there in the lower house? .....
5 How long is the term of office of a United States Senator? .....
6 How many Senators are there from each state? .....
7 For how long a period are members of the House of Representatives elected? .....
8 In what city does Congress meet? .....

[4] There is no allegation of discriminatory enforcement, and the method of examination, see n. 3, *supra*, makes unequal application

[*Footnote 5 on p. 7*]

concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

II.

The Morgan Cases (Nos. 847 and 877).

These cases involve the same New York suffrage restriction discussed above, but the challenge here comes not in the form of a suit to enjoin enforcement of the state statute, but in a test of the constitutionality of a federal enactment which declares that "to secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpet any matter in the English language." Section 4 (e) of the Voting Rights Act of 1965. Section 4 (e) declares that anyone who has successfully completed six grades of schooling in an "American-flag" school, in which the primary language is not English, shall not be denied the right to vote because of an inability to sat-

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virtually impossible. McGovney has noted, *op. cit. supra*, at 62, that "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the State and precludes discrimination, so far as is humanly possible. See *Camacho* v. *Rogers*, 199 F. Supp. 155, 159–160.

[5] See McKinney's Consolidated Laws of New York Ann., Education Law, § 4605. See generally Handbook of Adult Education in the United States, 455–465 (Knowles, ed. 1960).

isfy an English literacy test.[6] Although the statute is framed in general terms, so far as has been shown it applies in actual effect only to citizens of Puerto Rican background, and the Court so treats it.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since § 5 of the Fourteenth Amendment[7] gives to the Congress power to "enforce" the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, *Ex parte Virginia*, 100 U. S. 339, I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. See *Strauder* v. *West*

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[6] The statute makes an exception to its sixth-grade rule so that where state law "provides that a different level of education is presumptive of literacy," the applicant must show that he has completed "an equivalent level of education" in the foreign-language United States school.

[7] Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Virginia, 100 U. S. 303, 310. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia, supra*, involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." 100 U. S., at 345. Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. See also *Clyatt* v. *United States*, 197 U. S. 207, sustaining the constitutionality of the anti-peonage laws, 14 Stat. 546, 42 U. S. C. § 1994 (1964 ed.), under the Enforcement Clause of the Thirteenth Amendment.

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina* v. *Katzenbach*, 383 U. S. 301, decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. See 383 U. S., at 308–315. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amend-

ment had been infringed by various state subterfuges. See 383 U. S., at 309, 329–330, 333–334. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4 (e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter, supra,* that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4 (e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due

process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest in what has been said that a legislative judgment of the type incorporated in § 4 (e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.[8] In *South Carolina* v. *Katzenbach, supra,* such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, and *Katzenbach* v. *McClung,* 379 U. S. 294, this Court upheld Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony," 379 U. S., at 253, which had been put before the Congress and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4 (e)[9] by way of showing that Spanish-speaking citizens are fully as capable of making informed

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[8] See generally Karst, Legislative Facts in Constitutional Litigation, 1960 The Supreme Court Review 75 (Kurland, ed.); Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637 (1966).

[9] There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act. See 111 Cong. Rec. 10643 (daily ed., May 19, 1965); *id.*, at 15101 (July 6, 1965); *id.*, at 15665 (July 9, 1965).

decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4 (e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, *e. g.*, in "public schools, public housing and law enforcement," *ante*, p. 10, to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns. See *Heart of Atlanta Motel, supra; South Carolina* v. *Katzenbach, supra.*

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457–458. However, it is also a canon of judicial review that state statutes are given a similar presumption, *Butler* v. *Commonwealth*, 10 How. 402, 415. Whichever way this case is decided,

one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a State Legislature,[10] such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a "brooding omnipresence" over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that § 4 (e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dixit*

[10] See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 154–155 (1893).

can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

I would affirm the judgments in each of these cases.[11]

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[11] A number of other arguments have been suggested to sustain the constitutionality of § 4 (e). These are referred to in the Court's opinion, *ante*, p. 5, n. 5. Since all of such arguments are rendered superfluous by the Court's decision and none of them is considered by the majority, I deem it unnecessary to deal with them save to say that in my opinion none of those contentions provides an adequate constitutional basis for sustaining the statute.